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TRANSCRIPT OF RECORD.

Aff'd

SUPREME COURT OF THE UNITED STATES.

No. 274.

Field

PHILADELPHIA BAR ASSOCIATION

THE MASON LUMBER COMPANY, PLAINTIFF IN ERROR,

VS.

WILLIAM BUCHTEL.

R

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

FILED OCTOBER 12, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 274.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Michigan, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between William Buchtel, plaintiff, and The Mason Lumber Company, defendant, (said cause being numbered 905 in said circuit court), a manifest error hath happened, to the great damage of the said The Mason Lumber Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the third day of February, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.] CHESTER B. HINSDILL,
Clerk of the Circuit Court of the United States
for the Sixth Circuit and Western District of Michigan.

Allowed by—
S. L. WITHEY,
Dist. Judge.

2 WESTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify that a copy of the foregoing writ of error was lodged in the office of the clerk of the circuit court of the United States for the western district of Michigan for the said William Buchtel on the 3d day of February, 1877.

Dated Feb'y 3d, 1877.

[SEAL.] CHESTER B. HINSDILL,
Clerk of the Circuit Court of the United States
for the Western District of Michigan,
By A. B. CARRIER, *Deputy.*

WESTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify that the copy of the writ of error above mentioned was on the 3d day of February, A. D. 1877, delivered to Omar H. Simonds, esq., one of the firm of Taggart, Simonds & Fletcher, who were attorneys in said circuit court for said William Buchtel in the cause mentioned in the within writ of error.

Dated February 3d, 1877.

CHESTER B. HINSDILL,
Clerk of the Circuit Court of the United States
for the Western District of Michigan,
By A. B. CARRIER, *Deputy.*

(Indorsed:) U. S. Supreme Court. The Mason Lumber Co., pl'ff in error, vs. William Buchtel, def't in error. Writ of error.

3 UNITED STATES OF AMERICA, *ss:*

To William Buchtel, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October, A. D. 1877, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Michigan, wherein The Mason Lumber Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States this third day of February, in the year of our Lord one thousand eight hundred and seventy-seven.

S. L. WITHEY,
District Judge of the United States
for the Western District of Michigan.

4 UNITED STATES OF AMERICA,
Western District of Michigan, ss:

Jacob Kleinhaus, being duly sworn according to law, deposes and says that on the 3d day of February, 1877, he served upon Messrs Taggart, Simonds & Fletcher, attorneys of record for the within-named William Buchtel in the cause lately pending in the circuit court of the United States for the western district of Michigan, referred to in the within citation, a true and compared copy of said citation by delivering the same to Omar H. Simonds, one of the members of said firm of Taggart, Simonds & Fletcher, and at the same time I showed him this original citation under the signature of the United States district judge within-named.

JACOB KLEINHAUS.

Subscribed & sworn to before me this 3d day of February, 1877.

CHESTER B. HINSDILL,
U. S. Commissioner in & for Western District of Michigan.

(Indorsed:) U. S. Supreme Court. The Mason Lumber Company, pl'ff in error, vs. William Buchtel, def't in error. Citation and proof of service.

5 Know all men by these presents that we, The Mason Lumber Company, a corporation organized, created and doing business under and in pursuance of the laws of the State of Michigan, and having its principal office for the transaction of business at the city of Muskegon, in said State, as principal, and Lyman G. Mason and Charles S. Davis, of said city of Muskegon, as sureties, are held and firmly bound unto William Buchtel, of Akron, in the State of Ohio, in the full and just sum of twenty-one thousand and five hundred dollars to be paid to the said William Buchtel, his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our successors, heirs, executors, and administrators jointly and severally by these presents, sealed with our seals and dated this 3d day of February, in the year of our Lord one thousand eight hundred and seventy-seven.

Whereas lately, to wit, on the 3d day of February, A. D. 1877, at a session of the circuit court of the United States for the sixth circuit and

western district of Michigan, in a suit depending in said court and numbered 905 therein, wherein said William Buchtel was plaintiff and
6 the said The Mason Lumber Company was defendant, judgment was rendered in faver of said William Buchtel and against the said The Mason Lumber Company, and the said The Mason Lumber Company having obtained a writ of error to the Supreme Court of the United States and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment rendered in the aforesaid suit, and a citation directed to the said William Buchtel, citing him to be and appear at the Supreme Court of the United States to be holden at the city of Washington, in the District of Columbia, on the second Monday in October, in the year of our Lord one thousand eight hundred and seventy-seven:

Now, therefore, the condition of this obligation is such, that if the said The Mason Lumber Company shall prosecute its said writ of error to effect, and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

{ MASON LUMBER COMPANY, MUSKEGON, MICHIGAN. }

THE MASON LUMBER COMPANY,
By L. G. MASON, *President.*
LYMAN G. MASON. [L. S.]
CHARLES S. DAVIS. [L. S.]

Attest:
THOMAS MUNROE, *Sec'y.*

7 UNITED STATES OF AMERICA,
Western District of Michigan, ss:

Lyman G. Mason and Charles S. Davis, being each duly sworn, severally depose and say each for himself, and not one for the other, that they are the sureties named in and by whom the foregoing bond was executed; and they further say that they are severally worth the sum of twenty-one thousand and five hundred dollars in property subject to execution after the payment of all their just debts and liabilities.

LYMAN G. MASON.
CHARLES S. DAVIS.

Subscribed and sworn to before me this 3d day of February, 1877.

A. B. CARRIER,
Notary Public.

WESTERN DISTRICT OF MICHIGAN, *ss:*

I hereby approve of the foregoing bond in its form, amount and sufficiency of the sureties by whom it is executed and as good and sufficient security for a supersedeas bond under the statute.

Dated February 3d, 1877.

S. L. WITHEY,
District Judge of the United States for the Western District of Michigan.

(Indorsed:) U. S. circuit court for the west. dist. of Michigan. William Buchtel vs. The Mason Lumber Co. Supersedeas bond. Filed Feb'y 3, '77. Chester B. Hinsdill, clerk.

8 The circuit court of the United States for the sixth circuit and western district of Michigan.

UNITED STATES OF AMERICA,
Western District of Michigan, ss :

William Buchtel, of the city of Akron, in the State of Ohio, who is a citizen of the State of Ohio, plaintiff in this suit, by Taggart, Simonds & Fletcher, his attorneys, comes into this court in accordance with the act of Congress in such case made and provided, and filing this declaration as commencement of suit, complains of the Mason Lumber Company, a corporation existing under the laws of the State of Michigan, and which is a citizen of the State of Michigan, and a resident of the western district thereof, of a plea of trespass on the case upon promises; for that whereas heretofore, to wit, on the twenty-third day of September, A. D. 1874, the plaintiff entered into a certain agreement in writing with the Big Rapids Improvement and Manufacturing Company, a corporation then and from thence hitherto existing under and by virtue of the laws of the State of Michigan, which agreement in writing bore date the day and year last aforesaid, and was sealed with the seals of
9 the said plaintiff and the said The Big Rapids Improvement and Manufacturing Company, and was executed by the parties thereto at the western district of Michigan, and now shown the court here, wherein and whereby the plaintiff agreed to sell to the said The Big Rapids Improvement and Manufacturing Company certain lands therein mentioned, to wit: The northeast quarter and the north half of the northwest quarter of section eighteen (18); the southeast quarter, the northeast quarter of the southwest quarter of section eight (8); the west half of the southwest quarter, the west half of the northwest quarter, the southeast quarter of the northwest quarter, the southwest quarter of the northeast quarter of section twenty-four (24), all in township twenty-one (21) north, of range seven (7) west, in the county of Missaukee, in the State of Michigan, and containing six hundred and eighty one $\frac{88}{100}$ acres according to government survey, and wherein and whereby the said The Big Rapids Improvement and Manufacturing Company agreed and promised the plaintiff to pay him therefor the sum of twelve thousand two hundred seventy-three $\frac{84}{100}$ dollars in manner following, to wit:

The sum of three thousand sixty-eight $\frac{46}{100}$ dollars on the first
10 day of January then next, to wit, on the first day of January A. D. 1875, and the balance of said twelve thousand two hundred seventy-three $\frac{84}{100}$ dollars, to wit, the sum of nine thousand two hundred and five dollars and thirty-eight cents, in three equal annual payments of three thousand sixty-eight $\frac{46}{100}$ dollars, together with interest on all sums remaining due and unpaid, at the rate of seven per cent. per annum from the said 23 day of September, A. D. 1874.

The first of said yearly, to wit, annual payments of $3,068.46 and interest as aforesaid, was therein and thereby agreed and promised by the said The Big Rapids Improvement and Manufacturing Company to be made on the twenty-third day of September, A. D. 1875, and the other two of said yearly, to wit, annual payments and the interest as aforesaid were promised and agreed by the said The Big Rapids Improvement and Manufacturing Company to be made to the plaintiff on the 23 day of September in the year A. D. 1876 & A. D. 1877, respectively and that both said principal and interest should be paid at the Citizens' Saving and Loan Association in Akron, in the State of Ohio, and also that the said The Big Rapids Improvement and Manufacturing Com
11 pany should and would pay all taxes and assessments both ordi

nary and extraordinary and revenues imposed on said lands therein mentioned, and the said contract itself imposed thereon, from and after the 23d day of September, A. D. 1874, and therein, and thereby it was promised and agreed by the said plaintiff that forthwith after the payment of said purchase money and the interest and the said taxes as aforesaid he would convey the said lands therein described in fee simple to the said The Big Rapids Improvement and Manufacturing Company by warranty deed free from all incumbrances, subject, however, to such taxes, assessments, liens, titles, &c., subsequent to the said 23d day of September, A. D. 1874, and such liens and transfers as the said The Big Rapids Improvement and Manufacturing Company, its successor or assignee, might have then made, and it was therein and thereby also agreed by and between the plaintiff and the said The Big Rapids Improvement and Manufacturing Company, that no timber should be cut or removed from said lands therein described without the written permission of the said plaintiff endorsed on said contract, to wit, said written agreement.

And whereas, on, to wit, the twenty-fifth day of September, A.
12 D. 1874, at, to wit, the city of Muskegon in the western district
of Michigan, the defendant, the Mason Lumber Company, entered into a contract, to wit, an agreement in writing with the plaintiff and with the said The Big Rapids Improvement and Manufacturing Company, which said agreement in writing bore date the day and year last aforesaid, and was then executed and delivered, wherein and whereby for and in consideration of one dollar and for other valuable considerations, The Big Rapids Improvement and Manufacturing Company aforesaid assigned and set over to the said The Mason Lumber Company all its right, title and interest in and to the said land contract with plaintiff; and then and there in the said instrument of assignment, the defendant promised and agreed to and with the plaintiff in consideration of an agreement and permission therein contained on the part of the plaintiff to and with the said defendant, that it might enter upon said lands in said contract described, and cut and remove the timber therefrom, and also in consideration of his, plaintiff's, consent to the said assignment
to defendant to pay to the plaintiff the said payments in said land
12½ contract specified, to wit, the defendant then and there thereby
guaranteed the payment of the said sums of money in the said land contract specified according to the tenor and effect thereof, and plaintiff avers that the defendant, The Mason Lumber Company, was on the day and year last aforesaid and from thence hitherto has been and now is a corporation existing under the laws of the State of Michigan and that the principal office of said defendant was and is situate in the city of Muskegon in the western district of Michigan.

And plaintiff avers that in consideration of said guarantee by the said defendant of the payments in said land contract contained, and relying upon its promises and undertakings in that behalf, he did on the day and year last aforesaid consent in writing to the said assignment of said land contract from the said The Big Rapids Improvement and Manufacturing Company to the defendant, and did then and there in writing consent and give permission that the defendant might enter upon the said lands in said contract described and cut and remove therefrom the timber thereon, which said consent and permission aforesaid was then
and there attached to the said land contract aforesaid and as a
13 part thereof now shown the court here.

And the plaintiff avers that on the 1st day of January, A. D. 1875, there was due and payable to the plaintiff the sum of \$3,068 $\frac{46}{100}$

on said land contract, and that on the 23d day of September, A. D 1875, there was due and payable to the plaintiff the further and additional sum of $\$3,068\frac{46}{100}$ and the interest on the sum of $\$9,205\frac{38}{100}$ at the rate of seven per cent. per annum from the 23d day of September, A. D. 1874, and that on the day and year on which the said payments on the said land contract became due and payable as aforesaid, and each of them, and the said sum of interest, and from thence hitherto, the said The Big Rapids Improvement and Manufacturing Company did wholly neglect and refuse to make payment thereof or any part thereof, or any part of the said interest thereon, of which the said defendant had notice on the days and years last aforesaid respectively at the district aforesaid, whereby an action hath accrued to this plaintiff to demand, have of and from the said defendant the said two sums of money respectively, to wit, the whole sum of $\$6,136\frac{92}{100}$, together with interest on the sum of
$\$9,205\frac{38}{100}$ at 7 per cent. per annum from the 23d day of September,
14 A. D. 1874, yet the defendant has not (although often requested
so to do) paid any of the said sums of money or the said sum of interest or any part thereof, but refuses so to do, to the great damage of the plaintiff, to wit, to his damage of ten thousand dollars.

SECOND COUNT.—For that whereas heretofore, to wit, on the 23d day of September, A. D. 1874, the plaintiff entered into a certain other agreement in writing commonly called a land contract, with a certain corporation then and now existing under the laws of the State of Michigan, and known as the Big Rapids Improvement and Manufacturing Company, which said contract was sealed with the seals of the said parties thereto and bears date the day and year last aforesaid and now shown the court here, wherein and whereby the plaintiff agreed to sell and convey to the said The Big Rapids Improvement and Manufacturing Company, by warranty deed, in fee simple, free from all incumbrances save such as the said The Big Rapids Improvement and Manufacturing Company or its successors might itself put thereon subsequent to the day of the date of said land contract and such taxes and assessments as might be
levied thereon subsequent to the date of said contract, when
15 certain payments therein specified should have been made accord-
ing to the tenor and effect of said contract, the following described land, to wit:

The northeast quarter, the north half of the northwest quarter of section eighteen (18); the southeast quarter, the northeast quarter of the southwest quarter of section eight (8); the west half of the southwest quarter, the west half of the northwest quarter, the southeast quarter of the northwest quarter, the southwest quarter of the northeast quarter of section twenty-four (24), all in township twenty-one (21) north of range seven (7) west, in the county of Missaukee and State of Michigan, and containing six hundred and eighty-one and $\frac{88}{100}$ acres according to the government survey, more or less, and wherein and whereby the said The Big Rapids Improvement and Manufacturing Company promised and agreed to pay the said plaintiff for said lands the sum of twelve thousand two hundred and seventy-three & $\frac{84}{100}$ dollars, as follows: Three thousand & sixty-eight $\frac{46}{100}$ dollars on the first day of January, A. D. 1875. Three thousand sixty-eight $\frac{46}{100}$ dollars on the 23d day of September, A. D. 1875. Three thousand sixty-eight $\frac{46}{100}$ dollars on the 23d day of
September, 1876, and the sum of three thousand sixty-eight
16 $\frac{46}{100}$ on the 23d day of September, 1877, together with interest at
7 per cent. per annum from the date of said land contract on the whole sum unpaid; said interest to be paid on the 23d day of September in each of the years aforesaid, and wherein & whereby the said

The Big Rapids Improvement and Manufacturing Company promised and agreed to and with the plaintiff to thereafter pay and discharge all taxes and assessments, ordinary and extraordinary, and also for revenue purposes, imposed on said lands after the date of said land contract, and wherein and whereby it was expressly agreed between the said parties thereto that no timber should be cut or removed from said lands without the written permission of the plaintiff endorsed on said contract; and whereason, to wit, the twenty-fifth day of September, A. D. 1874, at, to wit, Muskegon, in the district aforesaid, the said The Big Rapids Improvement and Manufacturing Company assigned in writing the said land contract to the defendant for the consideration of one dollar and other valuable considerations then and there acknowledged by the said The Big Rapids Improvement and Manufacturing Company, and the
17 defendant did then and there, in consideration that the plaintiff
would give defendant permission to enter upon said lands in said contract described and cut and remove the timber therefrom, guarantee the payment of the sum of money in said land contract expressed according to the terms and effect thereof, and then and there the plaintiff, in consideration of the guarantee to him by the defendant of the payment of the said sum of money as aforesaid, did consent in writing and grant permission to the defendant to enter aforesaid lands and cut and remove the timber therefrom, which assignment, guarantee, and permission to cut, aforesaid, was and is attached to said land contract and now shown the court here as a part thereof and supplimental thereto.

And plaintiff avers that on, to wit, the 23d day of September, A. D. 1875, the sum of three thousand sixty-eight & $\frac{46}{100}$ dollars, together with interest on the sum of twelve thousand two hundred seventy-three $\frac{84}{100}$ dollars for one year at seven per cent., became due and payable upon said contract, and that the said The Big Rapids Improvement and Manufacturing Company on the day and year aforesaid, at the district aforesaid, did not nor would pay the said sum of money above men-
18 tioned, but refused so to do, of which the defendant then and there
had notice, wherefore the defendant by means of and in consideration of the premises became liable to pay the plaintiff the said sum of money aforesaid, and being so liable, then and there, on the day and year last aforesaid, at the district aforesaid, undertook and promised the plaintiff to pay him the said sum of money on request, yet the defendant, although being often requested, has disregarded its said promise and undertaking, and has not paid the said sum of money or any part thereof, but does still neglect and refuse so to do, to the great damage of the plaintiff, to wit, to his damage of ten thousand dollars.

3RD COUNT.—And for that whereas also on, to wit, the 23d day of September, A. D. 1874, at the district aforesaid, the plaintiff and a certain corporation then existing under the laws of the State of Michigan, to wit, the Big Rapids Improvement and Manufacturing Company, entered into a certain agreement in writing, commonly called a land contract, which contract bears date the day and year last aforesaid, and was and is sealed with the seals of the said plaintiff and the said
19 The Big Rapids Improvement and Manufacturing Company, and
now shown the court here, wherein and whereby the plaintiff agreed and promised to sell to the said The Big Rapids Improvement and Manufacturing Company, for the consideration of twelve thousand two hundred seventy-three $\frac{84}{100}$ dollars, and to convey by warranty deed to the said corporation in fee simple, free from all incumbrances, but subject to all liens and transfers which the said The Big Rapids Improvement and Manufacturing Company might make thereof or place thereon

subsequent to the date of said land contract, when the said $\$12,273\frac{84}{100}$ dollars should thereafter be paid in accordance with the terms and conditions in said land contract expressed, certain lands, to wit:

The northeast quarter, the north half of the northwest quarter of section eighteen (18); the southeast quarter, the northeast quarter of the southwest quarter of section eight (8); the west half of the southwest quarter, the west half of the northwest quarter, the southeast quarter of the northwest quarter, the southwest quarter of the northeast quarter of section twenty-four (24), all in township twenty-one (21)
north of range seven (7) west, in the county of Missaukee, and
20 State of Michigan, and containing six hundred and eighty-one &
$\frac{88}{100}$ acres, according to the government survey, more or less; and wherein and whereby the said The Big Rapids Improvement and Manufacturing Company promised and agreed to pay the plaintiff for the said lands therein and hereinabove described the said sum of twelve thousand two hundred and seventy-three$\frac{84}{100}$ dollars, as follows: \$3,068.46 on the first day of January, A. D. 1875; \$3,068.46 on the 23d day of September, A. D. 1875; \$3,068.46 on the 23d day of September, 1876; and the sum of \$3,068.46 on the 23d day of September, A. D. 1877, together with interest on all sums unpaid at seven per cent. per annum from the date of said land contract; and that payments of interest should commence to be made on the 23d day of September, 1875, and continue to be made on the 23d day of September, in each year, on all sums unpaid thereon, and wherein and whereby the said The Big Rapids Improvement and Manufacturing Company promised and agreed to pay and discharge all taxes and assessments, ordinary and extraordinary, which might be assessed or levied on said lands subsequent to the date of said contract; and it was also therein expressly agreed by
and between the said parties thereto, that no timber should be cut
20½ or removed from said lands described in said contract, without
the written permission of the plaintiff endorsed on said contract.

And whereas, to wit, on the 25th day of September, A. D. 1874, at the district aforesaid, the said The Big Rapids Improvement and Manufacturing Company, for the consideration of one dollar and other valuable considerations to it moving from the defendant, assigned in writing, and set over to the defendant, the said land contract hereinbefore mentioned, and on the same day and year last aforesaid, at the district aforesaid, the plaintiff for and in consideration that the defendant then and there guaranteed the payment to him of the sum of money in said land contract specified at the times and places therein mentioned, and in accordance with the terms thereof, and also the further agreement of the defendant, that so fast as the timber should be thereafter cut from said lands, that the purchase price of the lands so cut should then, to wit, upon the cutting thereof, become due and payable, and of the promise and agreement of the defendant to pay him the purchase price of so much and such parts of said lands in said contract mentioned, as should
be cut over, to wit, from which the timber shall be cut on the 23d
21 day of September, 1875, did, in writing, give permission to the
defendant, and allow it to enter upon the lands in said land contract mentioned, and cut and remove the timber therefrom; and therefore on the day and year last aforesaid, at the district aforesaid, the defendant for and in consideration of the permission of the plaintiff to it as aforesaid, to enter on said lands and cut and remove the timber therefrom, did in writing guarantee to the plaintiff the payment to him of the sum of money in said land contract mentioned, at times and places in manner therein specified, and did then and there also in con

sideration of the said permission of the plaintiff to cut and remove timber from the said lands, promise and agree in writing to and with the plaintiff that so fast as the timber should be cut from said lands, that the purchase price for the lands cut from and over, should then, to wit, at the time the same were cut from and over, become due and payable; and did then and there further agree to pay him on the 23d day of September, A. D. 1875, the purchase price of all said lands, that before that day should be cut, to wit, from which the timber had been before that day cut; which said assignment, said guarantee, and said promise to 22 pay the purchase price of lands cut, and said permission by the plaintiff to the defendant to enter upon and cut the timber from said lands, was and is attached to the said contract, and is now shown the court here.

And plaintiff avers that thereupon the defendant entered upon, to wit, all and singular the said lands, and cut from said lands the timber then thereon; and that on the 23d day of September, A. D. 1875, the timber from said had been and was cut; and that thereby in accordance with the terms of said last mentioned promise and agreement of the defendant with the plaintiff, the whole of the purchase price of said lands, to wit, the sum of $12,273.84, was due and payable to him; and plaintiff avers that on, to wit, the 23d day of September, A. D. 1875, at the district aforesaid, the defendant for and in consideration of the premises, respectively, became, and was liable to pay the plaintiff the sum of $9,205.38, and the interest on $12,273.84 for one year, at 7 per cent., to wit, the whole sum of ten thousand and fifty-four dollars and fifty-four cents, and being so liable as aforesaid, the defendant on the day and year last aforesaid, at the district aforesaid, promised and undertook to pay the plaintiff the said last mentioned sum of money on request, yet the defendant although often requested so to do, hath 23 not yet paid the said sum of money, or any part thereof to the plaintiff, to the great damage of the plaintiff, to wit, to his damage of twelve thousand dollars.

4TH COUNT.—And for that whereas, also on, to wit, the 23d day of September, A. D. 1874, at the district aforesaid, the plaintiff entered into a certain agreement in writing with a certain corporation called and known as The Big Rapids Improvement and Manufacturing Company, which said corporation then existed under and by virtue of the laws of the State of Michigan, which said last mentioned contract was commonly called a land contract and bears date the day and year last aforesaid, and was sealed with the seals of the parties thereto, and is now shown the court here, wherein and whereby the plaintiff, as the party of the first part, agreed to sell unto the said The Big Rapids Improvement and Manufacturing Company certain lands therein mentioned, to wit:

The northeast quarter, the north half of the northwest quarter of section eighteen (18); the southeast quarter, the northeast quarter of the southwest quarter of section eight (8); the west half of the southwest quarter, the west half of the northwest quarter, the south-24 east quarter of the northwest quarter, the southwest quarter of the northeast quarter of section twenty-four (24), all in township twenty-one (21) north of range seven (7) west, in the county of Missaukee and State of Michigan, and containing six hundred and eighty-one & $\frac{88}{100}$ acres, according to the government survey, more or less, for the price of twelve thousand two hundred seventy-three $\frac{84}{100}$ dollars, the same to be paid as follows: the sum of $3,068.46 on the 1st day of January, A. D. 1875; the sum of $3,068.46 on the

23d day of September, A. D. 1875; the sum of $3,068.46 on the 23d day of September, A. D. 1876, and the sum of $3,068.46 on the 23d day of September, A. D. 1877, and interest on the whole sum remaining unpaid at the rate of seven per cent. per annum from the date of said last mentioned land contract, and the payments of interest to commence on the 23d day of September, A. D. 1875, and continue to be paid on the 23d day of September in each and every year thereafter on all sums unpaid as aforesaid; and did therein and thereby agree to convey the said lands therein and hereinabove described to the said The Big Rapids Improvement and Manufacturing Company by warranty deed in fee simple, free and clear from all incumbrances then at the
date of said last mentioned land contract, upon and immedi-
25 ately after the said sum of money above mentioned should have
been paid him as in said land contract specified; and wherein and whereby the said The Big Rapids Improvement and Manufacturing Company, as the party of the second part, did, on the day and year last aforesaid, at the district aforesaid, promise and agree to and with the plaintiff to pay him for the said lands therein and hereinbefore described the said sum of $12,273.84, and the interest thereon, in the manner and form and at the times hereinbefore and in said contract specified and set forth, and wherein and whereby it was expressly agreed that no timber should be cut or removed from off said lands without the written consent and permission of the plaintiff endorsed on said land contract; and whereas on, to wit, the 25th day of September, A. D. 1874, the said The Big Rapids Improvement and Manufacturing Company, at the district aforesaid, for and in consideration of one dollar and other valuable considerations, by it then and there acknowledged, assigned in writing the said last mentioned land contract to the defendant, and thereupon the plaintiff then and there assented to the said assignment
thereof as aforesaid; and also then and there gave permission,
26 in writing, to the defendant to enter upon the said lands in said
last mentioned land contract described, and cut and remove the timber then thereon; and the defendant then and there at the district aforesaid on, to wit, the day and year last aforesaid, in consideration of the assent of the plaintiff to the said assignment of the said land contract to it as aforesaid, and in consideration of the said permission of the said plaintiff to it to enter upon the said lands and cut and remove the timber therefrom did guarantee, in writing, the payments as stipulated in said last mentioned land contract, to be paid to plaintiff, to wit, did then and there guarantee to the plaintiff and promise to pay him the said sum of money in the said last mentioned land contract mentioned in manner and form as the same was therein expressed to be paid in any event; and did then and there on the day and year last aforesaid, at the district aforesaid, further promise and agree to and with the plaintiff in consideration of the premises respectively, that in case timber should be cut and removed from off said lands in said last mentioned land contract described, that as fast as the timber thereon should
be cut and removed therefrom the purchase-price of the lands
27 so cut upon should be then, to wit, at the time of the cutting and
removal of the timber therefrom become due and payable, and that the defendant then and there, on the day and year last aforesaid, at the district aforesaid, promised and agreed to pay the plaintiff, on the 23d day of September, A. D. 1875, the full purchase-price, to wit, the sum of $18.00 per acre for all said lands then cut, together with the interest on the whole sum then unpaid, at the rate of seven per cent. per annum, from the 23d day of September, A. D. 1874, which said

guarantee and said assent to the said assignment of said contract and said permission by the plaintiff to the defendant to enter upon said lands and cut and remove the timber therefrom, and said last mentioned promise and agreement of the defendant to pay the purchase price of $18.00 per acre of said lands, on the 23d day of September, A. D. 1875, for what of said lands had been cut before and on that day was then and there attached to the said last mentioned land contract and now remains attached thereto and now shown the court here.

And plaintiff avers that thereupon and after the making of and attaching to the said land contract of the aforesaid and last mentioned stipulations and agreements of the defendant, it entered upon, to 28 wit, all and singular the said lands herein and in said land contract described, and before the 23d day of September, A. D. 1875, cut and removed therefrom, to wit, all and singular the timber before then thereon, and thereby the whole of the purchase price, to wit, $18.00 per acre of said lands became then and there, to wit, on the said 23d day of September, A. D. 1875, at the district aforesaid, due and payable to the plaintiff, together with interest, on the whole sum then due at 7 per cent. for one year.

And plaintiff avers that then and there, on the day and year last aforesaid, at the district aforesaid, the defendant, by virtue of the premises became liable to pay the plaintiff the sum of $13,133.00, to wit, the whole of the purchase price of said lands and the interest on the whole sum then due at 7 per cent. for one year, and being so liable then and thereon, to wit, the day and year last aforesaid, at the district aforesaid, promised the plaintiff to pay him the said sum of money on request; yet the defendant has not (although often requested so to do) paid the plaintiff the said sum of money, or any part thereof, to the great damage of the plaintiff, to wit, to his damage of twenty thousand dollars, and therefore he brings his suit, &c.

TAGGART, SIMONDS & FLETCHER,
Attorneys for Plaintiff.

(Indorsed:) The circuit court of the United States for the western district of Michigan and sixth circuit. William Buchtel vs. The Mason Lumber Company.

Narr.

To the within named defendant:

Take notice, that on filing a declaration in this cause (of which the within is a true copy) as commencement of suit, a rule was entered in the book of common rules, kept by the clerk of said court, in his office in the city of Grand Rapids, in the county of Kent and State of Michigan, requiring you to appear and plead to said declaration within twenty days after service on you of a copy thereof, and notice of said rule or judgment, etc.

Yours, etc.,

TAGGART, SIMONDS & FLETCHER,
Pl'ff's Att'ys.

GRAND RAPIDS, *Mich.*

Filed October 6th, 1875.

J. H. PARISH, *Clerk.*

29 UNITED STATES OF AMERICA,
Western District of Michigan, ss:

I hereby certify and return that on the 14th day of October, A. D.

1875, I served on L. G. Mason, the president of the Mason Lumber Company, and at the same time I served on Thomas Monroe, the secretary of the within-named defendant, by delivering to each of them a true copy of the within narr., at Muskegon, in said district, together with a copy of the notice to plead endorsed thereon as is hereon endorsed.

JOHN PARKER,
U. S. Marshal,
By S. J. BAILEY,
Deputy.

Service, $; copy, $; travel, miles, $.

30 May term, A. D. 1875.

William Buchtel
vs.
The Mason Lumber Company.

October 6th.

On filing declaration as commencement of suit, on motion of Taggart, Simonds & Fletcher, attorneys for the plaintiff, ordered that said defendant appear and plead to said declaration within twenty days after service of a copy thereof, together with notice of this rule or judgment, &c.

TAGGART, SIMONDS & FLETCHER,
Att'ys for Pl'ff.

31 The circuit court of the United States for the sixth circuit and western district of Michigan.

William Bucktel, pl'ff,
vs.
The Mason Lumber Company, def't.
Narr. served Oct. 14, 1875.

It is hereby stipulated that the order entering the default of said defendant for want of a plea, &c., be and the same is hereby set aside without terms.

Nov. 4th, 1875.

TAGGART, SIMONDS & FLETCHER,
Att'ys for Pl'ff.
SMITH, NIMS & ERWIN,
Att'ys for Def't.

(Indorsed :) The circuit court for the U. S., west. dist. of Mich. William Bucktell, pl'ff, vs. The Mason Lumber Company, def't. Stipulation vacating default, &c. Received and filed this 13th day of November, 1875. Chester B. Hinsdill, clerk.

32 United States of America:

The circuit court of the United States for the western district of Michigan.

The Mason Lumber Company, def't,
ads.
William Bucktel, pl'ff.
Narr. served Oct. 14th, 1875.

The said defendant, by Smith, Nims & Erwin, its attorneys, now comes and demands a trial of the matters set forth in said plaintiff's declaration.

SMITH, NIMS & ERWIN,
Attorneys for Defendant.

Please to take notice, that the defendant will give in evidence on the trial of this cause and insist and prove in its defence under the general issue above pleaded that at the time and place of making the said undertakings and promises by the said defendant as contained and set forth in said plaintiff's declaration, the said plaintiff, as an inducement thereof, did then and there represent, undertake and promise that the said lands mentioned and described in said plaintiff's declaration then contained and would yield five million seven hundred thousand feet, board measure, of good merchantable pine timber; that by reason of
33 said representation, undertaking, and promise by the said plaintiff, so made as aforesaid, the said defendant, confiding therein, was induced to and did take and receive from the Big Rapids Improvement and Manufacturing Company, named in said plaintiff's declaration, an assignment of all its interest in and to the contract named in said declaration by and between the said plaintiff and the said Big Rapids Improvement & Manufacturing Company, which said representations, undertakings and promises so made by the said plaintiff as aforesaid were false and fraudulent in this, to wit, that the said lands at the time of making the said representation, undertaking and promise did not contain and would not yield five million seven hundred thousand feet, board measure, of good merchantable pine timber, but contained and would yield only one million five hundred thousand feet, board measure, of such pine timber.

By reason whereof the said defendant hath sustained great damages, to wit, twenty thousand dollars, which said damages the said defendant will recoup against any claim that may be proved against it by the said plaintiff in said trial, and will apply the same, or so much thereof as may be necessary, to the satisfaction of such claim as the plaintiff may prove, and will have the balance certified in its favor.

34 Muskegon, Mich., Nov. 3, 1875.
Yours, &c.,

SMITH, NIMS & ERWIN,
Attorneys for Defendant.

To Messrs. TAGGART, SIMONDS & FLETCHER,
Attorneys for Plaintiff, Grand Rapids, Mich.

(Indorsed:) U. S. of America. Circuit court for west'n dist. of Michigan. Mason Lumber Co'y, def't, ads. William Bucktel, pl'ff. Plea and notice. Received and filed Nov. 5th, 1875. Chester B. Hinsdill, clerk. Simth, Nims & Erwin, att'ys for def't. Muskegon, Mich.

35 And the said defendant will further insist and prove that at the time and place of making the alleged guaranty by the defendant, as contained and set forth in said declaration, the said plaintiff and one Stephen Bronson, who was then and there vice-president of said Big Rapids Improvement and Manufacturing Company, acting in concert and with the common object to induce said defendant to make said alleged guaranty for the benefit of said plaintiff, did, as an inducement thereof, then and there represent, undertake and promise said defendant that the said lands mentioned and described in said declaration contained

and would yield five million seven hundred thousand feet, board measure, of good merchantable pine timber.

And the said Stephen Bronson and said plaintiff, in pursuance of said common object, and as a further inducement as aforesaid, did then and there produce the plat hereinafter mentioned which belonged to the plaintiff, and said Bronson, in the presence and hearing and with the acquiescence of said plaintiff, did then and there exhibit to said defendant a plat of said lands upon which there was marked, directly under said section 8, the figures 1,800, which said Bronson then and there represented and declared to said defendant meant that there was
36 eighteen hundred thousand feet, board measure, of the pine timber aforesaid standing and being on said section.

And upon which there was also marked directly under said section 18 the figures 1,700, which said Bronson then and there represented and declared to said defendant meant that there was seventeen hundred thousand feet, board measure, of the pine timber aforesaid, standing and being on said last-mentioned section.

And upon which there was also marked on the west half of the southwest quarter of said section 24 the figures 1,000, which said Bronson then and there represented and declared to said defendant meant that there was one million feet, board measure, of the pine timber aforesaid standing and being on said last described lands.

And upon which there was also marked on the west half of the northwest quarter, the southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of said section 24 the figures 1,200, which said Bronson then and there represented and declared to said defendant meant that there was one million two hundred thousand feet, board measure, of the pine timber aforesaid standing and being on said last-mentioned lands.

37 All which said declarations and representations by said Bronson were made in pursuance of said common object and as an inducement as aforesaid, and in the presence and hearing and with the acquiescence of said plaintiff.

That by reason of said representations, undertakings, and promises and the exhibition of said plat and the representations and declarations made thereon as aforesaid, the said defendant, confiding therein and relying thereon, was induced to and did make the guaranty mentioned and set forth in said declaration.

Which representations, undertakings, and promises, and the said plat and the representations and declarations made thereon as aforesaid, were untrue in this, to wit, that the said lands at the time of making said representations, undertakings, and promises, did not contain and would not yield five million seven hundred thousand feet, board measure, of good merchantable pine timber, but contained and would yield only, to wit, eleven hundred thousand feet of such pine timber.

And also, that said plat was false, and the declarations and representations made by said Bronson as aforesaid were untrue in this, to wit, that there was not then and there standing and being on said section 8 eighteen hundred thousand feet, board measure, of pine timber as
38 aforesaid, but that there was in truth and in fact at the time and place aforesaid only, to wit, three hundred and fifty thousand feet, board measure, of such pine timber standing and being on said section 8.

And also, that there was not then and there standing and being on said section 18 seventeen hundred thousand feet, board measure, of pine timber as aforesaid, but that there was in truth and fact at the time and place aforesaid only, to wit, three hundred and fifty thousand feet, board measure, of such pine timber standing and being on said section 18.

And also, that there was not then and there standing and being on the west half of the southwest quarter of said section 24 one million feet, board measure, of pine timber as aforesaid, but that there was in fact at the time and place aforesaid only, to wit, one hundred and sixty thousand feet, board measure, of such pine timber standing and being on said last-mentioned lands.

And also, that there was not then and there standing and being on the west half of the northwest quarter, the southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of said section 24 one million two hundred thousand feet, board measure, of pine timber as aforesaid, but that there was in truth and in
39 fact at the time and place aforesaid only, to wit, one hundred and
sixty thousand feet, board measure, of such pine timber standing and being on said last-mentioned lands.

By reason whereof the said defendant hath sustained great damages, to wit, twenty thousand dollars, which said damage the said defendant will recoup against any claim that may be proved against it by said plaintiff on said trial, and will apply the same or so much thereof as may be necessary to the satisfaction of such claim as said plaintiff may prove, and demands that judgment be entered in its favor for the balance.

And said defendants will also insist upon and prove that at the time and place aforesaid, the said plaintiff well knowing that the inducement for the defendants executing said guaranty was to obtain the amount of timber which the plaintiff represented was contained on said lands as above mentioned, to wit, five million seven hundred thousand feet, board measure, of good merchantable pine timber, and to induce the defendant to make said guaranty, did then and there make to said defendant other representations of the same tenor, character, and effect as the representations, declarations, undertakings, and promises
40 hereinbefore set forth, and did then and there warrant the said
representations to be true, and did also then and there warrant that said lands contained and would yield five million seven hundred thousand feet, board measure, of good merchantable pine timber.

That by reason of said representations and warranties the said defendant, confiding therein and relying thereon, was induced to and did execute said guaranty.

Which representations were untrue in each and every particular in manner and form as hereinbefore particularly stated; and also in this, that said lands did not then and there contain and would not yield five million seven hundred thousand feet, board measure, of good merchantable pine timber, but in truth and in fact contained and would yield only, to wit, eleven hundred thousand feet of such timber.

By reason whereof said warranties have become and now are broken, and the said defendant hath sustained great damages, to wit, twenty thousand dollars, which said damages said defendant will recoup against any claim that may be proved against it by said plaintiff on said trial, and will apply the same or so much thereof as may be necessary to the satisfaction of such claim as said plaintiff may prove, and
41 demand that judgment be entered in its favor for the balance.

Nov. 30th, 1876.

SMITH, NIMS & ERWIN,
Attorneys for Def't.

(Indorsed:) The circuit court of the United States for the sixth circuit and western district of Michigan. The Mason Lumber Co. ads William Buchtel. Amended plea & notice. Filed Dec. 2d, '76. Chester B. Hinsdill, clerk. Smith, Nims & Erwin, def't's att'ys.

42 The circuit court of the United States for the sixth circuit and western district of Michigan.

WILLIAM BUCHTEL
vs.
THE MASON LUMBER CO.

In this cause it is stipulated by and between the respective parties, by their attorneys, that the timber on the lands described in the contract between William Buchtel, the plaintiff, and the Big Rapids Improvement and Manufacturing Company, of date the 23d of September, A. D. 1874, has all been cut, and was so cut during the years 1874 and 1875, and prior to the commencement of this suit.

That so much of said timber as was on the described parts of sections 8 and 18 in said contract was cut by Aaron Miller, and that upon section 24 was cut by Andrew Green, under contract from the Big Rapids Improvement and Manufacturing Company.

TAGGART, SIMONDS & FLETCHER,
Plff. Att'ys.
SMITH, NIMS & ERWIN,
Att'ys for Def't.

(Indorsed:) U. S. court for west'n dist. of Mich. Wm. Buchtel vs. Mason Lumber Co. Stipulation. Filed Nov. 29, '76. Chester B. Hinsdill, clerk.

43 THE UNITED STATES OF AMERICA,
Western District of Michigan, ss:

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, begun and held at the city of Grand Rapids on the 8th day of December, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States of America the one hundred and first—present, the honorable Solomon L. Withey, district judge—among the proceedings then and there had were the following, to wit:

WILLIAM BUCHTELL
vs.
THE MASON LUMBER COMPANY.

The jury heretofore empanneled in this cause sat together in the jury box, and heard the evidence this day adduced, and after listening to the arguments of counsel and the charge of the court, without leaving their seats say, upon their oaths, that the said defendant did undertake and promise in manner and form as the plaintiff has in his declaration alleged, and assess the damages at the sum of ten thousand six hundred twenty-eight and thirty-six one-hundredths dollars ($10,628.36) over and above the costs and charges.

It is therefore considered by the court that the said plaintiff do recover against the said defendant the said sum so assessed as aforesaid, together with his costs and charges to be taxed, and that he have execution therefor.

On motion of the attorneys for the defendant, ordered, that judgment in this cause be arrested, with stay of all proceedings except as to taxation of costs, until January 3d, A. D. 1877, and that defendant have five days in which to enter a motion for a new trial.

44 THE UNITED STATES OF AMERICA,
Western District of Michigan, ss :

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, begun and held at the city of Grand Rapids, on the 9th day of January, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States of America the one hundred and first—present, the honorable Solomon L. Withey, district judge—among the proceedings then and there had were the following, to wit:

WILLIAM BUCKTEL
vs.
THE MASON LUMBER CO.

Upon the rendition of the verdict in this cause, the court having ordered that judgment and all proceedings therein should be stayed until its further order in the premises, and the clerk having afterwards inadvertently entered judgment on said verdict, it is therefore ordered that the entry of such judgment made at pages 737 and 738 of journal D of this court, under date of December 8th, 1876, be, and the same is hereby, amended by striking out the following words, viz:

"It is therefore considered by the court that the said plaintiff do recover against the said defendant the said sum so assessed as aforesaid, together with his costs and charges to be taxed, and that he have execution therefor.

"On motion of the attorneys for the defendant, ordered, that judgment in this cause be arrested, with stay of all proceedings except as to the taxation of costs, until January 3d, A. D. 1877."

And that in lieu thereof the following be inserted, viz:

45 "It is ordered that judgment and all proceedings on said verdict be, and the same are hereby, stayed until the further order of the court in the premises."

46 THE UNITED STATES OF AMERICA,
Western District of Michigan, ss;

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, begun and held at the city of Grand Rapids on the 3d day of February, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States of America the one hundred and first—present, the honorable Solomon L. Withey, district judge—among the proceedings then and there had were the following, to wit:

WILLIAM BUCKTEL
vs.
THE MASON LUMBER COMPANY.

This cause came on to be heard upon a motion for a new trial, and after hearing the arguments of counsel and due deliberation being had thereon, ordered, that the same be, and hereby is, denied, with costs, including an attorney fee of ten dollars, and that judgment be entered against defendant.

47 THE UNITED STATES OF AMERICA,
Western District of Michigan, ss:

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, begun and held at the city of Grand Rapids on the 3d day of February, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States of America the one hundred and first—present, the honorable Solomon L. Withey, district judge—among the proceedings then and there had were the following, to wit:

WILLIAM BUCHTEL
vs.
THE MASON LUMBER COMPANY.

The jury by whom the issue joined in this cause was tried having heretofore, on the eighth day of December, A. D. 1876, rendered a verdict therein in favor of the plaintiff and against the defendant, and having assessed the damages of the said plaintiff on occasion of the premises at the sum of ten thousand six hundred twenty-eight and $\frac{36}{100}$ dollars ($10,628.36), over and above his costs and charges by him about his suit in that behalf expended:

Therefore it is considered by the court that the said plaintiff do recover against the said defendant his damages as aforesaid assessed, and interest thereon from the rendition of said verdict, and also fifty-six and $\frac{71}{100}$ dollars ($56.71) for his costs and charges aforesaid, which said damages, interest, costs, and charges in the whole amount to ten thousand eight hundred and $\frac{81}{100}$ dollars ($10,800.81), and that he have execution therefor, and that defendant have sixty days to prepare and settle bill of exceptions.

48 THE UNITED STATES OF AMERICA,
Western District of Michigan, ss:

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, begun and held at the city of Grand Rapids on the 31 day of March, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States of America the one hundred and first—present, the honorable Solomon L. Withey, district judge—among the proceedings then and there had were the following, to wit:

WILLIAM BUCKTELL
vs.
THE MASON LUMBER COMPANY.

In this cause, by consent of the attorneys for the respective parties, ordered that the time given herein in which to settle bill of exceptions be extended thirty days.

49

UNITED STATES OF AMERICA,
Western District of Michigan, ss:

In the circuit court of the United States for the western district of Michigan. October term, 1876.

WILLIAM BUCHTELL
vs.
THE MASON LUMBER CO.
} No. 905.

Be it remembered that heretofore, to wit. upon the trial of the above-entitled cause, before the honorable Solomon L. Withey, one of the judges of said court, and a jury, the plaintiff, to maintain and prove the issues on his part, introduced and read in evidence a certain contract, bearing date the twenty-third day of September, 1874, made and executed between the above-named plaintiff and the Big Rapids Improvement and Manufacturing Company; which said contract is in the words and figures following, to wit:

50 This contract, made the 23d day of September, in the year one thousand eight hundred and seventy-four, between Wm. Buchtel, of Akron, Ohio, party of the first part, and the Big Rapids Improvement and Manufacturing Company, of Big Rapids, Mich., party of the second part, witnesseth as follows, to wit:

I. The party of the first part for himself, *himself*, executors, and administrators, agrees to sell to the said party of the second part all those certain pieces or parcels of lands situate, lying, and being in the county of Missaukee, in the State of Michigan, which are known and described as follows, to wit: The northeast quarter and the north half of the northwest quarter of section eighteen (18); also, the southeast quarter and the northeast quarter of the southwest quarter of section eight (8); also, the west half of the southwest quarter and the west half of the northwest quarter and the southeast quarter of the northwest quarter and the southwest quarter of the northeast quarter of section twenty-four (24), all in township twenty-one (21) north, of range seven (7) west, containing six hundred and eighty-one and $\frac{88}{100}$ acres, according to the United survey, be the same more or less.

51 II. The said party of the second part, for itself, and successors, and assigns, agrees to pay to the said party of the first part for said lands the sum of twelve thousand two hundred and seventy-three and $\frac{84}{100}$ dollars, as follows: Three thousand and sixty-eight & $\frac{46}{100}$ dollars on the first day of January next, with interest thereon at ten per cent., and the balance in three equal annual payments. The first annual payment to be made on the 23rd day of September, A. D. 1875, with interest from the date thereof, to be paid on the 23rd day of September in each year on the whole sum remaining due or unpaid in each year at the rate of 7 per centum; and the said party of the second part shall also pay and discharge all taxes and assessments of whatever name or character imposed on said premises, or upon this contract, from and after the 23rd day of September, A. D. 1874, whether ordinary, extraordinary, or for revenue purposes, both said principal and interest payable at the Citizens' Saving & Loan Association, Akron, Ohio.

III. Forthwith, after the full payment of said purchsse money, taxes, and interest as aforesaid, the party of the first part agrees to execute, or cause to be executed, to the party of the second part a good and

sufficient warranty deed for the said lands, so as to convey
52 the same in fee simple free from incumbrances to said party of the
second part, subject, however, to all taxes, assessments, and liens, or titles thereunder accrued or levied after the date thereof, and subject, also, to all liens or transfers made by the party of the second part, its successors or assigns.

IV. In case default shall be made by the party of the second part, its successors or assigns, in any of the conditions above stipulated to be performed by it, it shall and may be lawful for the party of the first part, if he see fit, to declare this contract void, and to re-enter upon said premises at any time after such default, without serving on the party of the second part, or other persons holding under it, a notice to quit said land.

And in case this contract shall be so declared void, the party of the second part shall thenceforth be deemed a mere tenant under the said party of the first part, and be liable to be proceeded against with*with*out notice to quit, under the provisions of an act regulating proceedings in case of forcible entry and detainer, and the acts amending the same; and the party of the first part in such case shall be at liberty to sell
the said land to any person or persons whomsoever without
53 being liable in law or equity to the party of the second part, or
any person claiming under it, for any damages in consequence of such sale, or to return any payments made on this contract, and payments that shall have been made may be held by the party of the first part as stipulated damages for the non-performance of this contract, and said first party shall have a right to recover all damages sustained by reason of the holding over of said second party without permission.

And it is hereby expressly understood, declared, and agreed by and between the parties hereto that time is and shall be deemed and taken as the very essence of this contract, and all courts shall so construe the same; and that unless the same shall in all respects be complied with by the said party of the second part at the respective times and in the manner herein specified and declared, said party of the second part shall lose and be debarred from all rights, remedies, or actions, either in law or equity, upon or under this contract, and no waiver of time or manner of performance shall be implied nor alleged to excuse a failure unless such waiver shall be in writing, and signed by the party of the first part or his agent lawfully authorized.

54 No timber is to be cut or removed from said lands without the written permission of first party endorsed on this contract.

It is also expressly agreed that as often as any proceedings shall be taken by said party of the first part, either at law or in equity, to cancel this contract or regain possession of said premises said party of the second part shall pay to said party of the first part the sum of one hundred dollars as a reasonable attorney's or solicitor's fee in addition to all other legal costs, whether such proceedings shall terminate in the recovery of the possession of said premises by said first party, or the cancellation of this contract, or be sooner stayed by payment or otherwise.

And it is further expressly agreed that in case default shall be made by the party of the second part in any of the conditions stipulated to be performed by it, and the party of the first part shall see fit to declare this contract void, such declaration may be made by a brief notice thereof addressed to the party of the second part at Big Rapids, Mich., and deposited in the post-office in Akron, Ohio, with legal postage prepaid, and this shall constitute good and sufficient notice and service thereof.

55 In witness whereof the parties have hereunto set their hands and seals the day and year first above written. Second party executes by its vice-president, Stephen Bronson, and its secretary, Finley D. Brown, who by its articles of association are authorized to execute such instruments.

WILLIAM BUCHTEL. [L. S.]
BIG RAPIDS IMP. & M'F'G CO. [L. S.]
STEPHEN BRONSON, *V. Pres't.*

In presence of—
C. H. MILLER.
C. A. STICKNEY.

Attest:

F. D. BROWN, *Sec'y.*

56 The plaintiff, further to maintain the issues on his part, introduced and read in evidence a certain other contract, made and executed on the twenty-fifth day of September, A. D. 1874, between the said plaintiff, the Big Rapids Improvement and Manufacturing Company, and the defendant, in the words and figures following, to wit:

MUSKEGON, MICH.,
57 *Sept. 25h*, 1874.

In consideration of the sum of one dollar, the receipt of which is hereby acknowledged by the Big Rapids Imp. & Man'f'g Co., and for other valuable considerations, the Big Rapids Imp. & Man'f'g Co. hereby assigns the contract hereto attached, of date Sept. 23d, 1874, between William Buchtel, of Akron, Ohio, and said Big Rapids Imp. & M'f'g Co. The said Buchtel hereby assenting to this assignment with said Mason Lumber Co. hereby guarantee the payments as stipulated in said contract, upon which guarantee permission is hereby given to enter upon, cut, and remove the timber upon the lands described in said contract hereto attached, it being understood and agreed that as fast as the timber is cut and removed from said land, or any part thereof, the purchase price shall *shall* be due and payable; that is to say, for all said land which may be cut before the 23rd day of Sept., 1875, the full purchase price shall be paid on that date.

BIG RAPIDS IMP. & M'F'G CO.,
By S. BRONSON, *V. Pres't.*
WILLIAM BUCHTEL.

[MASON LUMBER COMPANY SEAL.]

MASON LUMBER CO.,
THOMAS MUNROE, *Sec'y.*

58 Also a written stipulation entered into between the counsel for the respective parties in the words and figures following, to wit:

In the circuit court of the United States for the sixth circuit and western district of Michigan.

WILLIAM BUCHTELL
vs.
THE MASON LUMBER CO.

In this cause it is stipulated by and between the respective parties, by their attorneys, that the timber on the land described in the contract between William Buchtell, the plaintiff, and the Big Rapids Improvement and Manufacturing Company, of date the 23rd of September, A. D. 1874, has all been cut and was so cut during the years 1874 and 1875, and prior to the commencement of this suit. That so much of said timber as was on the described parts of sections 8 and 18 in said contract was cut by Aaron Miller, and that upon section 24 was cut by Andrew Green, under contracts from the Big Rapids Improvement and Manufacturing Company.

TAGGART, SIMONDS & FLETCHER,
Pl'ff's Att'ys.
SMITH, NIMS & ERWIN,
Att'ys for Def't.

59 The said plaintiff, further to maintain the issues on his part offered in evidence the files and records in a previous suit between the same parties for the first instalment of the monies to be paid under the contract of the twenty-third day of September, 1874, consisting of a declaration, plea, stipulation to refer, order of reference, bill of exceptions settled by the referee, referee's report, exceptions to referee's report, order overruling exceptions, and judgment in favor of the plaintiff and against the defendant; which declaration, plea, stipulation, order of reference, referee's bill of exceptions, referee's report, exceptions to referee's report, order overruling exceptions, and judgment are in the words and figures following, to wit:

60 UNITED STATES OF AMERICA,
Western District of Michigan, ss:

The circuit court of the United States for the sixth circuit and western district of Michigan.

William Buchtel, of the city of Akron, in the State of Ohio, the plaintiff in this suit, by Taggart, Simonds and Fletcher, his attorneys, complain of the Mason Lumber Company, a corporation formed, existing, and doing business under and in pursuance of the laws of the State of Michigan, which is a citizen of the State of Michigan, the defendant herein, in a plea of trespass on the case upon promise filing this declaration as commencement of suit according to the form of the statute authorizing commencement of suit by declaration.

For that whereas, heretofore, to wit, on the twenty-third day of September, A. D. 1874, to wit, in the said western district of Michigan, the said plaintiff entered into a written contract and agreement with an incorporated company, under the laws of the State of Michigan, and named the Big Rapids Improvement and Manufacturing Company, in and by which the said Big Rapids Improvement and Manufacturing
Company promised and agreed to pay to the said plaintiff the
61 sum of twelve thousand two hundred and seventy-three & $\frac{84}{100}$ dol-
lars, as follows: three thousand and sixty eight & $\frac{46}{100}$ dollars on the first day of January next after the said twenty-third day of September, A. D. 1874, and interest thereon at ten per cent., and the balance in three equal annual payments, the first annual payment to be made on the 23rd day of September, A. D. 1875, with interest from the said 23rd day of September, A. D. 1874, to be paid on the 23rd day of September in each year on the whole sum remaining due or unpaid in each year at the rate of seven per centum; and in consideration of said agreement

and other promises of the said Big Rapids Improvement and Manufacturing Company, the said plaintiff in said contract and agreement agreed to sell to the said Big Rapids Improvement and Manufacturing Company all those certain pieces or parcels of land situate, lying, and being in the county of Missaukee, in the State of Michigan, which are known and described as follows, to wit:

The northeast quarter and the north half of the northwest of section eighteen; also the southeast quarter and the northeast quarter of the southwest quarter of section eight (8); also the west half of the southwest quarter, the west half of the northwest quarter, the south-
62 east quarter of the northwest quarter and the southwest quarter of the northeast quarter of section twenty-four (24), and all in township twenty-one (21) north, of range seven (7) west, containing six hundred and eighty-one & $\frac{88}{100}$ acres of land, according to United States survey, be the same more or *or* less, and upon the payment of the sum of money above specified at the time and in the manner above set forth, and the performance of the other covenants of said Big Rapids Improvement & Manufacturing Company set forth in said contract, to execute or cause to be executed to the said Big Rapids Improvement & Manufacturing Company a good and sufficient warranty deed of the land above described, so as to convey the same in fee simple, free from encumbrances, to said Big Rapids Improvement and Manufacturing Company, subject, however, to all taxes, assessments, and liens, or titles thereunder, which should accrue or be levied after the said 23d day of September, A. D. 1874, and subject to all liens and transfers made by the said Big Rapids Improvement and Manufacturing Company, its successors or assigns.

And it was further agreed in said contract that no timber should be cut or removed from said lands without the written permission of
63 the said plaintiff endorsed on the said contract.

And the plaintiff avers that afterward, to wit, on the 25th day of September, A. D. 1874, to wit, at the city of Muskegon, in said western district of Michigan, the said Big Rapids Improvement and Manufacturing Company, for and in consideration of the sum of one dollar and other valuable considerations, assigned by an instrument in writing of that date the contract above mentioned to the said Mason Lumber Company, the defendant above named, and in consideration of the said assignment, and of the said plaintiffs assenting to the same, and giving to the said Mason Lumber Company permission to enter upon, cut, and remove the timber upon the lands described in said contract, the said defendant, by an agreement in writing bearing date the day and year last aforesaid, there guaranteed the payment of the sum of money specified in the contract above mentioned, according to the tenor and effect of the said contract, if the said Big Rapids Improvement and Manufacturing Company should not so pay the same.

And plaintiff avers that the said Mason Lumber Company was on and before the said 25th day of September, A. D. 1875, and ever since
64 has been and still is a corporation formed and existing under and in pursuance of the laws of the State of Michigan, and that it has its principal office in the said city of Muskegon.

And plaintiff further avers that thereupon he, confiding in the said undertaking of the defendant, then and there assented to the said assignment of the said contract, and then and there gave permission (in a writing attached to the said contract) to the said defendant to enter upon the lands described in said contract and to cut and remove from said lands the timber upon them; and that, although the day of pay-

ment of the sum of three thousand and sixty-eight & $\frac{84}{100}$ dollars, and interest thereon at the rate of ten per cent. per annum from and after the 23d day of September, A. D. 1874, as specified in said contract, has heretofore elapsed, to wit, on the first day of January, A. D. 1875, the said Big Rapids Improvement and Manufacturing Company did not, nor would, on that day or at any other time pay to the plaintiff the said sum of money last above named, and the interest thereon as aforesaid, or any part thereof, but refused so to do, whereof the defendant on
65 the day last aforesaid there had notice, yet the said defendant
had not paid to the plaintiff the said sum of money which became due on said contract on the first day of January, A. D. 1875, or any part thereof, but refuses so to do.

And for that whereas heretofore, to wit, on the 23d day of September, A. D. 1874, the said plaintiff entered into a certain other written contract and agreement with an incorporated company, incorporated under the laws of the State of Michigan, and named the Big Rapids Improvement and Manufacturing Company, in and by which the said Big Rapids Improvement and Manufacturing Company promised and agreed to pay to the said plaintiff the sum of twelve thousand two hundred and seventy three & $\frac{84}{100}$ dollars, as follows: Three thousand and sixty eight & $\frac{46}{100}$ dollars on the first day of January next, after the said twenty-third day of September, A. D. 1874, and interest thereon at ten per cent., and the balance in three equal annual payments, the first annual payment to be made on the twenty-third day of September, A. D. 1875, with interest from the said 23d day of September, A. D. 1874, to be paid on the 23d day of September in each year, on the whole sum remaining
66 due or unpaid in each year, at the rate of seven per centum; and
in consideration of said agreement and other promises of the said Big Rapids Improvement and Manufacturing Company, the said plaintiff in said contract and agreement, agreed to sell to the said Big Rapids Improvement and Manufacturing Company all those certain pieces or parcels of land situate, lying, and being in the county of Missaukee, in the State of Michigan, which are known and described as follows, to wit:

The northeast quarter and the north half of the northwest quarter of section eighteen; also the southeast quarter and the northeast quarter of the southwest quarter of section eight (8); also the west half of the southwest quarter, the west half of the northwest quarter, the southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of section twenty-four (24), and all in township twenty-one (21) north, of range seven (7) west, containing six hundred and eighty-one & $\frac{88}{100}$ acres of land according to United States survey, be the same more or less, and upon the payment of the sum of money above specified, at the time and in the manner above set forth, and the
67 performance of the other *other* covenants of the said Big Rapids
Improvement and Manufacturing Company, set forth in said contract, to execute or cause to be executed to the said Big Rapids Improvement and Manufacturing Company a good and sufficient warranty deed of the lands above described, so as to convey the same in fee simple, free from encumbrances, to said Big Rapids Improvement and Manufacturing Company, subject, however, to all taxes, assessments, and liens, or titles thereunder, which should accrue or be levied after the said 23d day of September, A. D. 1874, and subject to all liens and transfers made by the said Big Rapids Improvement and Manufacturing Company, its successors or assigns.

And it was further agreed in said contract that no timber should be

cut or removed from said lands without the written permission of said plaintiff endorsed on the said contract; and plaintiff avers that afterwards, to wit, on the 25th day of September, A. D. 1874, to wit, at the city of Muskegon, in said western district of Michigan, the said Big Rapids Improvement and Manufacturing Company, for and in consideration of the sum of one dollar and other valuable considerations, assigned,
by an instrument in writing of that date, the contract above
68 mentioned to the said Mason Lumber Company, the defendant
herein, and in consideration of the said assignment, and of the said plaintiff's assenting to the same and giving to the said Mason Lumber Company permission to enter upon, cut, and remove the timber upon the lands described in said contract, the said defendant, by an agreement in writing, bearing date the day and year last aforesaid, there agreed to pay the plaintiff and promised to pay him the sum of money specified in the contract above mentioned, according to the tenor and effect of the said contract.

And plaintiff avers that thereupon he, confiding in the said undertaking of the defendant, then and there assented to the said assignment ot the said contract, and gave permission to the said defendant in a writing attached to said contract to enter upon the lands described in said contract, and to cut and remove from said lands the timber upon them, and that although the day of payment of the sum of three thousand sixty-eight & $\frac{84}{100}$ dollars and interest thereon at the rate of ten per cent. per annum from and after the 23d day of September, A. D. 1874, as specified in said contract, has heretofore elapsed, to wit, on the first
day of January, A. D. 1875, the said defendant has not paid to
69 the plaintiff the said sum of money last above specified; but
so to do has neglected and refused, and still neglects and refuses so to do.

And whereas, also, the defendant on, to wit, the first day of January, A. D. 1875, to wit, in the western district of Michigan aforesaid, was indebted to the plaintiff in the sum of five thousand dollars for money before that time lent by the plaintiff to the defendant at its request, and in a like sum for money before that time paid and expended by the plaintiff for the defendant, at its request, and in a like sum for money before that time received by the defendant for the use of the plaintiff, and in a like sum for interest on divers sums of money before that time forborne by the plaintiff to the defendant at its request for divers spaces of time before then elapsed; and in a like sum for goods, chattels, and effects before that time sold and delivered by the plaintiff to the defendant at its request, and in a like sum for goods, chattels, and effects before that time bargained and sold by the plaintiff to the defendant at its request; and in a like sum for money found to be due from the defendant to the plaintiff on an account then and there stated between
them; and being so indebted, the defendant, in consideration
70 thereof, then and there promised the plaintiff to pay him on re-
quest the said several sums of money so due to him as aforesaid; yet the defendant, though requested, has not paid the same, or either of them, or any part thereof, to the plaintiff, but refuses so to do; nor has the defendant, though often requested, paid to the plaintiff the said several sums of money in the several counts of this declaration specified, or any of them, or any part thereof; but so to do has wholly neglected and refused, and still does neglect and refused so to do, to the damage of the plaintiff five thousand dollars, and therefore he brings suit, &c.

TAGGART, SIMONDS & FLETCHER,
Attorneys for Plaintiff.

To the above-named defendant:

Take notice that the following is a bill of particulars of all of the plaintiff's demand under the common counts of the above declaration.

June 1, 1875. To installment of three thousand and sixty-eight &
$\frac{84}{100}$ dollars, which became due on this day on a contract dated Septem-
ber 23d, A. D. 1874, made between Wm. Buchtel and the Big
71 Rapids Improvement and Manufacturing Company, afterwards
assigned by the Big Rapids Improvement and Manufacturing
Company to the defendant, and interest on the same from the 23d day
of September, 1874, at the rate of ten per cent.

TAGGART, SIMONDS & FLETCHER,
Plaintiff's Attorneys.

To the above-named defendant:

Please to take notice, that on filing a declaration, of which the above is a true copy, in the office of the clerk of this court, a rule was duly entered requiring you to plead to the said declaration within twenty days after service of a copy thereof, and notice of said rule or judgment, &c.

TAGGART, SIMONDS & FLETCHER,
Attorneys for Plaintiff.

Filed April 12th, 1875.

72 STATE OF MICHIGAN,
County of Kent, ss:

Charles A. Renwick, of said county, being duly sworn, deposes and says that on the twelfth day of April, A. D. 1875, he served this declaration on the within-named defendant by delivering a copy of this declaration to Thomas Munroe, esq., secretary of the said defendant, in the county of Muskegon, in the western district of Michigan, together with the notice to appear and plead endorsed thereon and hereon endorsed.

CHARLES A. RENWICK.

Subscribed and sworn to before me this 17th day of April, A. D. 1875.

T. A. WORKMAN,
Notary Public, Kent Co., Mich.

73 UNITED STATES OF AMERICA:

The circuit court of the United States for the western district of Michigan.

THE MASON LUMBER COMPANY, DEF'T,
ads.
WILLIAM BUCHTEL, PL'FF.

The said defendant, by Smith, Nims & Erwin, its attorneys, now comes and demands a trial of the matters set forth in said plaintiff's declaration.

SMITH, NIMS & ERWIN,
Attorneys for the Defendant.

Please to take notice that the defendant will give in evidence on the trial of this cause, and insist and prove in its defence under the general issue above pleaded, that at the time and place of making the said undertakings and promises by the said defendant as contained and set

forth in said plaintiff's declaration, the said plaintiff as an inducement thereof did then and there represent, undertake, and promise that the said lands mentioned and described in said plaintiff's declaration then contained and would yield five million seven hundred thousand feet, board measure, of good merchantable pine timber; that by reason
74 of said representation, undertaking, and promise by the said
plaintiff, so made as aforesaid, the said defendant, confiding therein, was induced to and did take and receive from the Big Rapids Improvement and Manufacturing Company named in said plaintiff's declaration, an assignment of all its interest in and to the contract named in said declaration by and between the said plaintiff and the said Big Rapids Improvement and Manufacturing Company, which said representation, undertaking, and promise so made by the said plaintiff as aforesaid were false and fraudulent in this, to wit, that the said lands at the time of making the said representation, undertaking, and promise did not contain and would not yield five million seven hundred thousand feet, board measure, of good merchantable pine timber, but contained and would yield only one million five hundred thousand feet, board measure, of such pine timber.

By reason whereof the said defendant hath sustained great damages, to wit, twenty thousand dollars, which said damages the said defendant will recoup against any claim that may be proved against it by the said plaintiff in said trial, and will apply the same, or so much thereof as may be necessary, to the satisfaction of such claim as the plaint-
75 iff may prove, and will have the balance certified in its favor.

Yours, &c.,

SMITH, NIMS & ERWIN,
Attorneys for Defendant.

To Messrs. TAGGART, SIMONDS & FLETCHER,
Attorneys for Plaintiff.

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76 UNITED STATES OF AMERICA:

In the circuit court for the sixth circuit and western district of Michigan.

WILLIAM BUCHTEL
vs.
THE MASON LUMBER COMPANY.

It is hereby stipulated by the parties to the above cause, by and through their respective attorneys, that the above cause may be by an order of said court referred to James W. Ransom, esquire, an attorney of this court, as referee, for trial before him as such referee, and that upon the coming in of the report of said referee this court may pronounce judgment thereupon, or take such action thereon as shall be agreeable to the rights of the parties and the practice of the circuit courts for the State of Michigan in referred causes.

Dated Nov. 8, 1875.

TAGGART, SIMONDS & FLETCHER,
Pl'ff's Att'ys.
SMITH, NIMS & ERWIN,
Attorneys for Def't.

77 UNITED STATES OF AMERICA:

In the circuit court of the United States for the sixth circuit and western district of Michigan.

WILLIAM BUCHTEL
vs.
THE MASON LUMBER COMPANY.
} Assumpsit. Nov. 9th, A. D. 1875.

In this cause by and in pursuance of the consent of the attorneys of the respective parties, by stipulation now on file herein, it is ordered by the court now here that said cause be, and the same is hereby, referred to James W. Ransom, esq., pursuant to the statute of the State of Michigan in such case made and provided, to try the same and due report make to this court in accordance with the rules and practice of courts of record of the State of Michigan applicable to referred causes.

78 STATE OF MICHIGAN:

The circuit court of the United States for the sixth circuit and western district of Michigan.

THE MASON LUMBER COMPANY, DEFENDANT,
ads.
WILLIAM BUCHTEL, PLAINTIFF.

Before the Hon. J. W. Ransom, referee in said cause.

At a session of the said referee court held at his chamber, in the city of Grand Rapids, in said circuit and district, on the seventh day of December, A. D. 1875, before the Hon. J. W. Ransom, the said referee in said cause, the issue joined between the parties in this cause came on to be heard by the said referee, at which day there came then as well the said plaintiff as the said defendant by their respective attorneys.

And upon the trial of the issue aforesaid, the counsel for the said plaintiff, to maintain and prove the said issue on his part, produced and offered in evidence certain contracts for the sale of lands, bearing date the 23rd day of September, A. D. 1874, between William Buchtel, 79 the plaintiff in this cause, of the first part, and the Big Rapids Improvement and Manufacturing Company, of the second part, which was in the words and figures following (see contract, Exhibit A, annexed), and to which said last-named contract or writing obligatory was annexed another paper writing obligatory in the words and figures following, to wit (on Exhibit B annexed), but to the reading of the said paper in evidence the said counsel for the said defendant did then and there object because the said first-named contract, A, was not a writing obligatory between the plaintiff and defendant in this cause, and did not of itself impart any liability against this defendant, and that it was immaterial.

And to the second paper, B, because it is immaterial, irrelevant, and is not the paper writing described and set forth in the plaintiff's declaration in this cause.

But the said referee did then and there declare and deliver his opinion that the said objection, so taken by the counsel for the said defendant as aforesaid, ought not to be allowed, but that the said writings obligatory ought to be admitted in evidence, and did accordingly decide that the same should be read in evidence on the part of the said plaintiff, to which said opinion and decision of the said referee the said counsel for the defendant did then and there, on behalf of the said defendant, except.

80 It was then admitted that the Big Rapids Improvement and Manufacturing Company and the Mason Lumber Company were corporations, existing under the laws of the State of Michigan.

The said two writings obligatory were received and marked A and B.

And the said counsel for the said plaintiff, further to maintain and prove issue on his part, called WILLIAM BUCHTEL, who, being duly sworn, testified:

I am the plaintiff; am a citizen of Ohio; reside at Akron, in said State; am the William Buchtel named in the contracts A and B just received in evidence; have been in the lumber business for the last nine or ten years.

The counsel for the said plaintiff asked the said witness:

Q. State as to what payments, if any, you have received upon those contracts.

(To which question the counsel for the defendant duly objected, as being immaterial and incompetent.

But the said referee overruled said objection, and permitted the said question to be answered.

To which ruling of the said referee the counsel for the defendant then and there duly excepted.)

The witness answered:

I have not received anything on either of them.

81 The said plaintiff then rested his case.

The counsel for the said defendant, to maintain and prove the said issue on his part, produced and had sworn as a witness LYMAN G. MASON, who testified substantially:

I reside at Muskegon, Michigan, in said district; am the president of the defendant; my business is lumbering; have been at the business since 1856; I have known the plaintiff since September, 1874; I know the Big Rapids Improvement and Manufacturing Company; know Stephen Bronson; have known him for a number of years. I saw the papers Exhibits A and B on the 25th of September, 1874, for the first time.

Question by the defendant's counsel:

Q. State, if you know, how the Mason Lumber Company came to execute Exhibit B; that is, the circumstances that induced it.

A. Well, it was executed because of representations that were made as to the quantity of timber upon the lands described in the contract attached to it, Exhibit A.

The witness further testified:

The representations were made by the plaintiff Buchtel and Mr. Bronson, and by a plat of the township exhibited; the lands colored, and figures showing the quantity in each section. (The witness here identified the plat exhibited at the time last named.) I cannot
82 say who brought the plat to my office. It was there when we were all together, at the time this writing was made, Exhibit B. I suppose Bronson and Buchtel came together. They were there together on the 25th of September, 1874. I think General Bronson took the plat away. I afterward got it from him.

The figures that are now on the map (i. e.), 1,700 on sec. 18, 1,800 on sec. 8 (i. e.), just below the colored line on sec. 8 (it is on sec. 17), and 1,000 and 1,200 on sec. 24, were on the map as now on the 25th of September, 1874.

William Buchtel came to our office with Mr. Bronson, presented the contract which has been marked Exhibit A, and we had a contract previously with the Big Rapids Improvement and Manufacturing Company for a quantity of said logs, to be cut from lands the same as described in this contract, Exhibit A, and including some other lands. Of course Mr. Buchtel objected to the cutting. In fact, Mr. Bronson had no right to cut at the same time when they came together upon these lands as they had not been paid for; and after considerable talk between us three, and part of the time with Mr. Munroe, our secretary, who executed this agreement, and upon the representation as to the quantity of timber that we were to get under this contract of Bronson and would get from this land, we signed the instrument Exhibit B.

83 The plat was exhibited, the quantity of timber represented, and because of those representations Exhibit B was executed.

Question by defendant's counsel:

Q. What were the representations?

(To which question the attorney for the plaintiff did then and there object, because the question does not limit the answer to representations made by the plaintiff Buchtel.

And thereupon the said referee declared and delivered his opinion, that the said question might be answered under the instructions which are now given, and which I have intimated before, that whatever Mr. Bronson may have said is not material to the case, and the plaintiff is not bound by it until they show either Mr. Bronson acting as the agent of the plaintiff or the plaintiff present and assenting to what Mr. Bronson said in relation to the quantity of timber. I think the question may be asked.

To which rulings and instructions so given by the said referee the attorney for the said defendant did then and there duly except.)

Witness then answered:

The representations were that the quantity of timber designated by these figures was on the lands.

The referee then instructed the witness: "Give what was said, as near as you can; the conversation in relation to it, as near as you
84 can," when the witness proceeded:

Well, the interview lasted, I should presume, several hours. My recollection of it and just what was said: I recollect one remark that was made after we had come to an understanding. I remarked to Mr. Buchtel and to Mr. Bronson—we were both present, and I think Mr. Munroe was present at that time—that the Big Rapids Improvement Company had a good thing in this contract; they had a clear margin of quite an amount of money, and made some rough figures as to the amount it would nett them, or the cost, I will not say which, they paying so much for getting the logs in, and we paying the contract price between them and us and for the logs. The quantity of timber, as I said before, I think was 5,700,000 on these sections 8, 18, and 24. I took the figures down at the time, and made a duplicate plat of it.

Question by defendant's att'y:

Ques. State this remark that you have just now stated as having been made by you, whether it was based upon that representation or not?

(To which question the attorney for the said plaintiff then and there objected as irrelevant, immaterial, incompetent, and leading.

Which objection, so taken by the attorney for said plaintiff, was sustained by said referee, and the answer to said question was not permitted to be given.

85 To which ruling of said referee the attorney for the said defendant did duly except.)

Question by defendant's attorney:

Ques. I ask him why he made that remark.

(To which question the attorney for the said plaintiff then and there objected, as incompetent. What his reasons were, the reasons must be gathered from the substance of his conversation.

Which objection, so taken by the attorney for the said plaintiff, was sustained by the referee, and an answer to the said question not permitted.

To which ruling of said referee the attorney for the said defendant did duly except.)

Question by defendant's attorney:

Ques. What led you to make that remark?

(To which question the attorney for the said plaintiff then and there objected, as incompetent.

Which objection, so taken by said plaintiff, was sustained by the referee.

To which ruling of said referee the attorneys for the said defendant duly excepted.)

Question by defendant's attorney:

Ques. What conversation led you to make that remark?

(To which question the attorney for the said plaintiff did then and there object, as incompetent and immaterial.)

Question by referee to defendant's counsel:

Ques. Is that material?

86 Counsel for defendant answered: It is explanatory. I say that the remark, as it now appears, is misleading. It gives it as the judgment of Mr. Mason, a lumberman, that the Big Rapids Improvement Company, under that original contract, marked A, had a good contract. Now, I propose to show how he came to make that remark, and whether, as a matter of fact, it was correct or not.

To which answer and offer of said defendant's counsel, said referee then and there delivered his opinion, as follows:

"The remark was made, he says, after they had come to an understanding, and after their business was, as a matter of fact, settled, and it was not responsive to any question that had been put to him. It don't seem to me that there was any significance at all to the remark."

And the said referee refused to permit the question to be answered.

To which opinion and ruling his, defendant's, counsel then and there duly excepted.

The witness further testified that the portion of sections 8, 18, and 24, in town 21 north, of range 7 west, and set forth in the contract Exhibit A, were the lands represented to contain 5,700,000 feet of pine timber.

Mr. Smith. Who made those representations as to the amount of timber on the lands?

87 Ans. I think they both did. Certainly Mr. Buchtel did not object—did not contradict them, and the map was presented and

my whole action was based upon the information that I got then and there from those two men as to the quantity of timber on the lands.

Mr. Ballard moved to strike out the latter part of the answer, as not responsive to the question.

The witness immediately further answered, "From the men and from the plat."

The REFEREE. As the witness now has it, it may stand. That such representations were made by the plaintiff, Buchtel, and Stephen Bronson, and the plat introduced and marked Exhibit C; that the plat C was produced in connection with Exhibit A, which was in duplicate; that during this interview, at the time the representations aforesaid were named, Buchtel (the plaintiff), Stephen Bronson, Thomas Munroe, and the witness were present; that he received no other consideration or inducement from Mr. Buchtel than the representations made as to the quantity of pine on sections 8, 18, and 24 above named, nor from any person for him, for the signing of Exhibit B. Further, that he had no knowledge whatever, at the time of the execution of Exhibit B, of the quantity of timber on described parts of sections 8, 18,
88 and 24, excepting what he derived from the plaintiff, Buchtel, and
Bronson together, at that time; that the Mason Lumber Company had no knowledge as to the quantity of timber on the lands last above described on said 25th of September, 1874, so far as witness knew; that said company derived its knowledge as to the quantity of timber on said lands on said 25th of September from said Buchtel and Bronson.

Mr. SMITH. For whom was Mr. Bronson acting then, if you know, on the 25th day of September, 1874?

Ans. For the Big Rapids Improvement and Manufacturing Company.

That witness on said 25th of September was the president of the Mason Lumber Company, and carried on the negotiations on said day in behalf of said company.

The witness further testified that there was cut from the lands named in Exhibit A, since said 25th of September, of all qualities, to the amount of 1,162,343 feet.

Question by defendant's counsel:

Ques. State, Mr. Mason, whether after the signing of Exhibit B you paid any money to Mr. Buchtel or Mr. Bronson, and what amount.

(To which question counsel for plaintiff objected, as immaterial as to payments to Mr. Bronson.

89 The counsel for the defendant stated, "The materiality is this:
We claim that under the contract of September 17—the exhibit—Mr. Bronson represented that his company is the owner of the lands which are described in Exhibit A, and had the right to cut the timber therefrom and deliver it to the Mason Lumber Company, and under and by virtue of those representations made September 25th, 1874, that there was 5,700,000 feet of timber on these lands, Exhibit B was signed by Mason Lumber Company, and $1,500.00, or an amount of money, was paid over. It was a part of the transaction, and following those representations, and we say there was a privity of interest between Buchtel and Bronson, and a privity of representation between those two men, for the purpose of getting money out of the Mason Lumber Company."

By the REFEREE. I cannot see any relevancy to the testimony showing payments of money to Mr. Bronson so far and pursuant of a common design between Mr. Bronson and Mr. Buchtel which would indicate in any manner that they were pursuing a fraudulent transaction. There is nothing of that kind appearing in the case yet. So far as Mr. Bronson is concerned I think I must sustain the objection, at this stage of the case, at least.

The objection sustained, and exception taken for defendant.

90 The witness answered: I paid none to Buchtel.

Ques. What was done by defendant in consequence of the representations made as to the quantity of timber on the lands named in Exhibit A, and after the execution of Exhibit B?

Plaintiff's counsel objected. It is certainly the same question that was asked before in relation to the payments.

Defendant's counsel stated, "We expect to prove by this evidence, and the object of his interrogatory is to show, that, relying upon these representations as true, the defendant paid over money to the Big Rapids Imp. and Manufacturing Company, under their contract, which they would not have done except for the representations held out by Buchtel and Bronson as to the quantity of timber contained on these lands, and we expect to ask judgment by way of recoupment."

"Without the explanation I should have permitted the question to be asked, but under the explanation I can't see how it is pertinent or proper that the plaintiff should be held responsible for the payments made to Bronson, unless the plaintiff was a party to the arrangement by which the payments were made. It does not seem to me that it is within the scope of the issue."

91 (Plaintiff's counsel further objected as immaterial and incompetent.

Objection sustained by the referee, and exception taken for the defendant.)

Ques. Was Mr. Buchtel aware of the existence of the contract that we introduced this morning marked Exhibit D on said 25th of September, 1874?

Ans. I think he was fully aware of it. We had entered into a contract, Mr. Buchtel, the Big Rapids Improvement and Manufacturing Company, and the Mason Lumber Company, which refers to that contract and which is signed by Buchtel.

Ques. You think he was?

Ans. Yes, sir.

Ques. Now I shall press the question I asked before. What was done by defendants in consequence of the representations made as to the quantity of timber on the lands named in Exhibit A after the execution of Exhibit B?

(Objected to by plaintiff's counsel the same as before.)

Defendant's counsel states: "We propose it now under a different statement, and that is to show what was done in consequence of those representations, or the acts of the parties."

92 The REFEREE. The witness may answer this question, and will answer under the ruling which I have already given in relation to payments to Bronson, or anything of that kind. The transaction, of course, must be confined between himself and the plaintiff.

An exception taken to referee's ruling by defendant.

Witness answers: We proceeded with the contract we had for the timber supposed to be on the land, and made the payments according to that contract until we became satisfied or felt, or became informed, that the timber was not going to hold out, and my impression is until January or thereabouts.

Ques. That the timber was not going to hold out on what land?

Ans. On these lands.

Ques. Exhibit A lands?

Ans. Yes, sir; the other lands we were not to have the timber from until after a certain quantity was delivered to other parties.

Mr. BALLARD. Wait a moment. I ask to have that answer entirely stricken out as entirely incompetent and irrelevant, and further for the reason that he does not pretend to separate the lands here in contract D from those mentioned in contracts A and B. I insist upon my objection mentioned being stricken out.

93 REFEREE. I think I will let the testimony stand just as it is, but at the same time I say, as I have already said, that I can't see under the pleading in this case how it can be material what money he paid under Exhibit D unless plaintiff is connected with that transaction in some way more than in the testimony which is already in shows that he is. Go on and answer the question fully.

WITNESS. I thought I had answered it.

Ques. No; whether you went on and performed—what did you do in that performance—something besides ascertaining the quantity of timber, I suppose?

Mr. BALLARD. This is all considered under the same objection, I suppose.

REFEREE. Yes.

Ans. We made payments, one payment that day after the execution of this that was stipulated to be paid.

Q. State the amounts?

$1,500 that day, and $3,000 I would say the following month (a contract here handed to witness to refresh his memory), October 10th, $2,000; November, $3,000; and if I recollect it right, December, $3,000; some other payments to apply on December 10th, to the amount of about I think $1,000; I would say January 10th, from my recollection of just the amounts that were paid. I am not positive about after December.

94 Ques. Upon the hypothesis that there was 1,162,343 feet of timber cut from those lands, and that there is about 75,000 feet yet remaining upon those lands only, state what damage the Mason Lumber Company suffered by reason of this shortage between that amount and the amount represented by the plaintiff in this suit?

Ans. The No. 1 logs amounted to 815,000 feet and the No. 2 to 346,000 feet. The same ratio would give in the neighborhood of 4,000,000 feet of No. 1 logs out of 5,700,000 feet off of that land, and 1,700,000 of No. 2; that would leave us something over 3,000,000 feet of No. 1 logs short.

Ques. State how much. Just give the exact figures.

Ans. If it was just 4,000,000 that it should yield of No. 1 logs it would give us 3,000,185 that we were short, receiving only 815,000, in round numbers 3,000,000, and of the number 2 there should he a shortage of 1,350,000. The No. 1 logs afforded us a profit of at the least calculation $2.00 a thousand. The No. 2 logs I don't suppose would furnish us any profit. Those we purchased afterwards and were not taken into consideration at the time of the negotiations.

Ques. State whether you could procure the same class of timber at that point or at any point along the Muskegon river after this default, this shortage, became known or not.

95 (Objected to for plaintiff as incompetent. Answer taken subject to the objection sustained.)

A. I don't believe it would be possible to have procured that quantity and quality of logs after January at any such price, if at all.

You say after January. Was that the time the shortage became known to you?

Ans. Some time during the month of January I became pretty well satisfied that the timber was not going to hold out.

Ques. State whether in consequence of this default you were put to any trouble or expense to get other logs to stock your mill, and if so, to what amount?

(Objected to for plaintiff and taken as last above.)

Ans. We were obliged to purchase other logs, but at what extra cost or trouble I could not state in dollars and cents. We did purchase other logs to make up our stock for our mill, which of course we should not have purchased had they come down. We purchased common logs, as a rule, after that, and such as the market afforded, and no very good ones.

Ques. Are you able to state now whether those you did purchase afforded any and what margin as compared with these No. 1 logs?

(Objected to for plaintiff as incompetent. Taken subject to objection.)

Ans. I can state generally, there was no profit on common logs or on common stock. Our margin has been entirely on our good stock. I have not the figures.

96 Cross-examination:

During the cross-examination the witness was shown a paper by plaintiff's counsel and asked:

Ques. Do you know that handwriting and that signature?

Ans. Yes, sir.

Ques. Whose is it?

Ans. Mine.

Plaintiff's counsel here offered the paper in evidence, stating that it was out of the ordinary order of proof, but he wished to put it in because he wished to ask the witness some questions about it as a part of the plaintiff's case.

(To the reception of the paper in evidence the defendant's counsel objected as irrelevant, immaterial, and not cross-examination. The objection not going to the order of proof. Paper taken and marked Exhibit E.)

Ques. How long prior to the date of this letter, marked Exhibit E, did you know that Bronson had not paid this first payment on Exhibit A?

Ans. Well, previous to the 10th; that telegram was on the 10th. Mr. Buchtel was at Muskegon the day before, I think, or the day or two before, and went from Muskegon to Big Rapids.

Defendant's counsel suggested: You stated that telegram was on the 15th, once.

97 WITNESS. I get mixed on that date.

Ques. The question is, how long before the date of that letter did you know that Bronson had not paid the first payment on contract A?

Ans. I can't tell you.

Q. Do you know what that letter was in answer to?

A. It does not appear to be in answer to anything, to any letter.

Q. Have you any recollection about it as to whether it was or not?

A. I have not now (refers to papers); no it does not appear to be in answer to any letter.

Q. State whether or not you had a conversation with Mr. Buchtel himself sometime in January in relation to this payment?

A. He was at Muskegon and talked the matter over and he went from Muskegon to Big Rapids.

Q. About when was that?

A. It was the day before the telegram was sent from Big Rapids; if that is dated the 15th, it must have been the 14th.

Q. And if was the 10th, it must have been the 9th?

A. Yes, sir; I have no other means of stating the time.

Q. Can you give us that conversation that took place between you and he in relation to this payment?

A. No, sir; he went from Muskegon after that conversation with a view——

Q. No, I don't care to know about that; I simply ask whether you could give that conversation at this time; whether you could state the substance of 't?

98 A. No, sir; I cannot; I can only state that I undoubtedly told him the situation.

The referee here calls your attention to the conversation; give it if you can.

A. No, sir; I have no distinct recollection about it.

Plaintiff's counsel says: This letter, Exhibit E, seems to be a little ambiguous. I wish to ask you what payment you had reference to in the language of that letter.

(Objection for defendant that it is immaterial and incompetent. The objection is not to the order if proof. Testimony taken; defendant excepted.)

A. It refers to the first payment due on Contract A.

THOMAS MUNROE, sworn for the defendant:

I live at Muskegon; am secretary of the defendant; saw the plaintiff at defendant's office in Muskegon on the 25th of Sept., 1874. Gen'l Bronson, Mr. Mason and myself were with him at the time. He came to the office with Mr. Bronson probably about 9 o'clock a. m. The plaintiff had business transactions there on that occasion with the defendant. The plaintiff and Gen'l Bronson came together to defendant's office; Mr. Mason came in about the same time. The matter of sale of logs came up.

99 (The contract of Sept. 17th, Exhibit D, shown the witness.)

This was shown, looked over, and I think read by Mr. Mason; read it aloud in the presence of Mr. Buchtel and Bronson.

(A plat, Exhibit C, shown.)

Mr. Bronson and Mr. Buchtel did most of the talking; Mr. Mason did the figuring. Mason occupied one side of the table, Buchtel and Bronson the other. Mason had a scratch-book before him. Buchtel and Bronson did most of the talking and showed the amount of timber that was on the described parts of sections 8, 18 & 24 in dispute in this case in town 21 north, range 7 west. Mason did the figuring, took the amounts off, of timber as represented on the plat.

Q. What was the amount of timber, if you recollect, that was represented by the parties as being on those lands or parts of sections 8, 18, & 24 in town 21, 7?

(Objected to for plaintiff, the question is too general, is not confined to representations made by plaintiff.)

A. Well, the amount was as shown by the figures that are there now:

1,700,000 f't on section 18.
1,800,000 " " " 8.
2,200,000 " " " 24.

Q. State what part plaintiff took in these conversations and negotiations that you have now related.

100 A. Well, they both did the talking; Mr. Mason did some talking, asked questions and took figures down as they gave them to him. Exhibit C laid on the table with other papers between them.

Q. Can you give us the language of what each said? You have been giving the conversation; we want the language of each of the actors as near as you can give it.

A. I cannot give the exact words that each party said that day; the talk was general; both parties represented that there was a large amount of timber; I mean Mr. Buchtel and Mr. Bronson.

Q. Can you state substantially the conversation as it occurred?

A. Yes, it was substantially this: that there was 5,700,000 ft. of timber there on the lands described and of good quality; the quality was the same, about, on all the descriptions

Q. What lands do you mean?

(Objected for plaintiff as not separating the matter.)

REFEREE. Taken, subject to the objection.

A. The lands described and marked on Exhibit C in sections 8, 18, & 24.

Witness further says: Both Buchtel and Bronson made that representation. The described parts of section 24 were described as
101 being of equal quality to sections 8 & 18 by Mr. Buchtel because
no one else knew about them. Section 24 was substituted at the time in contract Exhibit D in place of section 4. This conference lasted in the office, I should think, a good part of the forenoon if not all. As the result of these negotiations in the office Mr. Mason wrote out two agreements on such paper as this legal cap, in pencil, one for the lands in 21—7, and one for some lands in 21—8. After he had written that out we looked over them together and they were read to Mr. Buchtel and Mr. Bronson and agreed upon. I made two copies of one, the bookkeeper two copies of the other. My recollection is they were made in the forenoon and executed in the afternoon. The result of these negotiations was the execution of Exhibit B.

Q. State, if you know, what was the particular inducement in the signing of Exhibit B on the part of the defendant, or execution of it.

(Objection to the last question, for plaintiff; the question calls for an inference, not for a fact.)

REFEREE. Let him state all that took place in those negotiations
there between the parties as near as he can if he has not already
102 stated it. I don't think it would be proper to ask the witness
that question. What was the inducement?

WITNESS. I think I have already answered that.

Mr. SMITH. Then I understand the referee rules the question an improper one.

REFEREE. Yes, sir; that is a conclusion of the witness; result of certain facts of which he is cognizant or supposed to be cognizant; now you can state those facts.

(Objection sustained; exception taken for defendant.)

A. It was the amount of timber represented to be on the lands. It has been our custom for me to execute contracts.

Q. State, if you know, whether or not Mason Lumber Co. would have executed Exhibit B had it not been for the representations of plaintiff Buchtel that there was 5,700,000 ft. of pine timber on the lands described in town 27—7, and sections 8, 18 & 24 as marked on Exhibit C, and being the same lands described in Exhibit A.

(Objected to for plaintiff, that the question calls for an opinion of the witness not only of his opinion of the result of certain facts supposed to
be known by him, but further than that it calls for his opinion as
103 to the workings of L. G. Mason's mind, and is incompetent, irrelevant
and immaterial.)

By the referee: Objection sustained. Exception taken for the defendant.

Q. Would you, as one of the members of Mason Lumber Co., and as an officer, have executed the paper writing marked Exhibit B, in behalf of said company, had it not been for the representations then made by W. Buchtel, the plaintiff, that the lands described in the last preceding question contained the amount of pine timber stated, namely 5,700,000 f't?

(Objection for plaintiff, the same as the last preceding.)

By referee: Objection sustained and exception taken for defendant.

Cross-examination:

In answer to question by plaintiff's counsel witness says: It was about 9 o'clock in the forenoon when plaintiff and Bronson came to defendant's office. I was about the office. The negotiations were carried on in Mr. Mason's room. My business in and about the office is to do anything in the business that presents itself. My principal business that day was the transactions I have been detailing. I stepped out of
the room at times. Part of the time I was standing by the side
104 of Mr. Mason; part of the time sitting down on the same side of
the table. I was in the room most of the time till the execution of Exhibit B. I did not hear every word of the negotiations; heard the most of them; made it a point to be there most of the time looking things over. I would not execute a contract without consulting. I don't think Buchtel, plaintiff, left the office until towards noon, when he stepped out back of the office, going down about the barn, say about eleven or half-pa*lf* eleven.

It was about as near twelve o'clock as could be when he returned. He was gone from twenty minutes to one-half an hour. Cannot say if any one was in Mason's room at the time Buchtel was gone out. Can't say where Bronson was. Mason was with Buchtel part of the time. They came back together. I think the contracts were drawn before Buchtel went away, and were being copied while Mr. Buchtel was out.

Buchtel was away after that in the afternoon. I think the contracts were signed after he returned from down below, i. e., they were signed in the evening before five o'clock, before tea. We had an interval of an hour or an hour and a half at dinner, when none of the parties were
at the office. I left for dinner pretty soon after twelve o'clock.
105 My recollection is that Bronson, Buchtel, and Mason were together
in the office after Mr. Buchtel returned from the month. I don't think we had any lights in the office at the time; it was before dark. I think Bronson was not about the office much of the afternoon, but returned before Buchtel did. Can't say how long they were there. I think the contracts were all done at the same time; of that I am certain. It was not very long after Buchtel and Bronson came, in the morning, before I saw exhibit C on the table. I don't know who produced it.

The first I saw of it, it lay open on the table with the contract of September 17th and these two land contracts. Exhibit C was shown there early in the forenoon.

Can't say who first spoke of the plat, nor what was said by such person; that is, the words which the person used. I think Bronson first spoke of their business when they came in the morning. He said they had come to fix up that land matter. I had no intimation of their coming; don't know that Mason had. Contract Exhibit D is in my handwriting; that is my signature on it. Did not see Exhibit C at the time Exhibit D was made. The first time I ever saw Exhibit C was the morning of the 25th of September, 1874. In contract D there was some lands covered by it as part of the lands that the Big Rapids Imp. and M'f'g Co. claim to own with the rest of the land. 106

When Mr. Buchtel came there he said he didn't own that, but he did own some on section 24 that was the same quality of timber, and at his request they were substituted in place of the lands on sec. 4.

I do not know that Mason and Buchtel were together in the office alone. Buchtel stepped into the adjoining room, and I stepped out with him. That left Mr. Bronson and Mr. Mason together in the office. I got the pencil draft to copy in the forenoon, I should think, at half-past eleven. The bookkeeper got the draft of the other contract before dinner. Can't say if he finished his copies before dinner. My recollection is that both contracts were executed at the same time, and after Mr. Buchtel's return towards evening.

Plaintiff's counsel shows witness paper writing, afterwards marked Exhibit F.

Witness says: This is the paper written by the bookkeeper at the time.

Paper offered in evidence.

(Objected to as irrelevant and immaterial by defendant. Objection overruled. Exception for defendant.

Paper received and marked Exhibit F.

107 Mason and Buchtel returned from the barn about twelve o'clock. I saw them returning from the barn and salt well. I don't think that Buchtel had been away from the office before he went away that time. I don't recollect Buchtel being absent on two occasions during these negotiations.

Redirect examination:

In answer to defendant's counsel witness says: Defendant had no knowledge as to the quantity of timber on these lands described in exhibit A prior to these negotiations on Sept. 25th, 1874. I think the copies of contracts were commenced before dinner, but were not finished until after dinner. My recollection is that the bookkeeper was making his copies at the same time I was at mine. Am not sure if we commenced together; but they were both executed when Buchtel returned from down below.

Recross:

In answer to plaintiff's counsel:

We had some knowledge of the quality of timber on sections 8 & 18, but no knowledge as to the quality or quantity of the timber on section 24, either on September 17th or at any time prior to the 25th, as I have stated, and no knowledge as to quantity on sections 8 and 18. 108

LYMAN G. MASON recalled for defendant:

Q. State whether you would have made this contract Exhibit B, for the Mason Lumber Co., had it not been for the representations made by Mr. Buchtel as to the quantity of pine timber on sections 8, 18 & 24 being 5,700,000 f't.

(Objected, for plaintiff:

1st. The question assumes that which is not proven, to wit, that Buchtel made such a representation.

2nd. That it is incompetent, as calling for an opinion and not a fact. Objection sustained, and defendant excepted.)

Q. What was the inducement which caused the Mason Lumber Company to execute exhibit B?

(The same objection as to the last preceding question for plaintiff. The objection sustained, and exception for defendant.)

Q. Look upon Exhibit F, the plaintiff's exhibit, and state when that paper was executed and how it came to be executed?

A. It was executed at the same time exhibit B was, and executed because Mr. Buchtel claimed the timber on that land, or objected to its
being cut beyond what was required to fill a contract Big Rapids
109 Imp. and Co. had with Eldred & Co., and this agreement is
for the payment of stumpage on any that might be cut from that land and delivered on contract D to us, a separate contract entirely from the one in connection with this in Exhibit A. Buchtel informed me on this 25th day of Sept. that he had a mortgage on those lands. That was the first I knew he had a mortgage on it. As to the title to the lands named in Exhibit F, I have no knowledge from Buchtel as to it prior to that date. Bronson claimed to hold the lands by deed from Buchtel. I mean the lands in contract F, and for part of the lands named in contract D. Bronson told me that his company had deeded these lands or mortgaged them to secure its contract for 2,500,000 f't.

Q. Now state whether one object of Buchtel's coming there was to close this contract, Exhibit B, and also get security for the payment of moneys due him on the mortgage from Bronson. What did Buchtel say about it?—A. I cannot say any particular words. The result of what was said was the execution of this contract to secure Mr. Buchtel $2.50 per M. on logs that we should cut under our contract from that land, to
be applied as stated in this contract.

110 Q. Did Mr. Buchtel appear anxious on that occasion to have
the arrangement perfected which culminated in the execution of Exhibits B and F?

(Objected to for plaintiff as immaterial and incompetent.)

REFEREE. I don't think the question is proper. He can state the transaction; he can give a description of the appearance of the party and his actions, and everything that would tend to show interest or lead one to the conclusion that he was laboring under undue excitement.

Referee sustains the objection, and exception taken for the defendant.

STEPHEN BRONSON sworn for defendant, and testified in answer to questions by defendant's counsel:

I reside at Big Rapids; have for 9 or 10 years. I am vice pres't of the Big Rapids Imp. & M'f'g Co. I know pl'ff; have known him four years; had business with him for our co. some time in Sept., '74. I, as an officer of the Big Rapids Imp. M'f'g Co., had business with plaintiff about the 23rd Sept.

Witness looks at Exhibits A & B, and says: Exhibit A was executed at Big Rapids on the 23rd Sept., '74, and Exhibit B at Muskegon on the 25th same month in the office of the Mason Lumber Co.

111 At the execution of B were present the plaintiff, L. G. Mason, Thomas Munroe, and witness.

The execution of Exhibit B was the result of negotiations with Mr. Mason on behalf of deft. in Mason's office. Mr. Buchtel, the pl'ff, and myself came there to Mason's office with a view of consummating something of this character or kind, and called upon Mason, and exhibited to him the situation of things, having formerly made a contract with defendant to sell it 4,000,000 feet of pine saw-logs; and in order to carry out the arrangement between the Big Rapids Imp. & M'f'g Co. and defendant satisfactorily, as a result this contract (Exhibit A) was drawn up and guaranteed by the defendant.

Q. Was there anything said by the parties present, and by whom, if anything, with respect to the amount of timber upon the land in that Exhibit A on that day and in that negotiation?

(Objected to for plaintiff as incompetent, and not confining the conversation to Mr. Mason and plaintiff. Any conversation between Mason and Bronson is incompetent. It has the same status that that had the other day.)

The REFEREE. Yes, sir; take it as that was.

112 Exception taken for defendant.

A. I am unable to state by whom the conversation or negotiations was introduced, but during the conversation that we had this map C was laid before the parties—Mason, Buchtel, Munroe, and myself—and a computation was made from this paper C with regard to the quantity of timber claimed to be on the land described in Exhibit A, and Mason said, in view of all the circumstances, he would enter into an arrangement of that kind to guaranty the contract. That was the result of it, that he thought that it was safe under the showing. On section 24, one 80 was marked; on Exhibit C. 1,000,000; the other two 80s. 1,200,000; section 8 was marked 1,800,000; and section 18, 1,700,000.

The figures on sec. 24 stand plain as they did then. They were on this plat when it came into my possession, and were on it at the time we were making those figures.

Those on section 8 are the same as then; those on section 18 are the same as then, and the writing the same—"cork and sap pine" on each piece.

Buchtel assisted in making figures—figured up—and exhibited to Mr. Mason, with myself together, the quantity of pine as shown by
113 the map and we talked from that basis. The amount of the figures was 5,700,000 feet. As the result of these negotiations Mason executed Exhibit B.

Cross-examination:

In answer to questions by plaintiff's counsel, witness says: I think plat C came into my possession in August, '74. I got it from Aaron Miller. I think I carried it to Muskegon on the 25th Sept., '74; can't say who called for it, Mason or Buchtel, or whether I produced it without a call. I took it away when we were through, and think I kept it till Feb. or March, '75. I then gave it to Mason, the pres't of the deft. I think it was about 9 a. m. of the 25th of Sept., '74. Buchtel and I went to Mason's office; may have been later than 10 a. m. I think we were all there together until the business was transacted; one or the other may have passed out for a few minutes during that time. I should say that it was in the afternoon when we got through, and Exhibit B

was signed, and the business was fully completed, and the papers exchanged. Buchtel and I went to Muskegon, pursuant to an agreement we made at Big Rapids. Those papers were executed from appearances and date at Big Rapids. Buchtel and I had our business done
114 and contracts drawn at Saginaw, but came to Big Rapids that the officers of our company could execute them.

The contract is in the handwriting of a Saginaw lawyer; he drew it. I don't know if Elisha Eldred was at Saginaw when this contract was drawn or not.

These negotiations took place in Mason's private room on September 25. I think Munroe was present during all the time the negotiations were going on, but I think he assisted in writing the papers, and was there in the other room—might have passed in and out during that time. I don't recollect that Buchtel was out during these negotiations any considerable length of time till the matter was closed up. He went away during the afternoon next after the closing up of these transactions. I saw Buchtel at the Occidental Hotel in the evening.

Redirect examination:

In answer to questions by defendant's attorney witness says: Buchtel told me to get the plat Exhibit C from Miller. I don't know if Miller was acting in any capacity for Buchtel or not.

In answer to referee witness says: Think A was executed in
115 duplicate and signed by each.

In answer to defendant's counsel witness says: The contract A was signed at Big Rapids, but it was not considered complete and finished till we got through with Mr. Mason; that was the way I understood it. It was not to be considered complete till he had Mason execute B. I cannot say who had the contracts till we got to Muskegon; don't think they were exchanged till we got there. I cannot say if I had them both or if Buchtel had, or whether each had one, but the business was not considered complete till we finished up with Mason, or in some form satisfactory to Buchtel.

Recross-examination:

In answer to questions by plaintiff's counsel witness says: This paper, Exhibit A, was signed at the Big Rapids Imp. & M'f'g Co.'s office in Big Rapids. I don't know that I had one in my pocket and Buchtel the other. It may be true that when B was signed I took one out of my pocket and Buchtel did the other out of his. I do not remember how they were taken to Muskegon, but I do remember distinctly that they were not considered as completed between us. That was our con-
116 versation and understanding at the time. I think there was such
conversation with the officers of the company at Big Rapids, and the balance of them would so recollect it, I think. We talked it over at Big Rapids, and it was not to be considered completed till we had gone to Muskegon and had fixed it satisfactorily to Mr. Buchtel. It was for our benefit that we might cut the lands and Mr. Buchtel's as security; that is what he was looking for—mutual benefit, as I looked upon it.

Q. Don't you know, sir, at this particular time that Mr. Eldred stood ready in Muskegon to take these lands at the very same price; didn't you know it at the time?

A. I had thought that from what Buchtel told me at that time that he was, but was informed afterwards that it was not so by Mr. Eldred at the Occidental.

Q. (By the REFEREE.) Where were you on the 23rd; that is, the date of A?

A. I think at Saginaw; that is, the date of the contract. We came to Big Rapids and executed it on the 24th. I think the next day we reached Muskegon.

Recross examination:

Q. Where did you go from to get to Saginaw?

117 A. From Big Rapids to Fort Wayne; from Fort Wayne to
Akron, Ohio; thence to Cleveland, thence to Toledo, Sandusky,
thence to Saginaw to see Buchtel. I thought at the time that Eldred
was chasing Buchtel up to get the same lands, but I learned I was mistaken.

Redirect examination:

I remember having the contract Exhibit D before Buchtel at Mason's office; whether I showed it him before or not I cannot swear positively, but I told him what I was doing and proposed to do in the matter, and from the best of my recollection we looked it over together before. I remember distinctly we read it over together at the Mason Lumber Co's office at the time Ex. B was executed. The parties were all present and heard it read.

Further examination of Bronson for defendant:

At Saginaw on the 23rd Sept., 1874, it was agreed between Buchtel
and myself to go to Muskegon and have Mason agree to pay him the
$2.50 stumpage on that land at the same time the mortgage was agreed
upon and executed. This part of the business was first fixed and agreed
upon between Buchtel and myself at Saginaw before the transaction
was agreed upon completely as regards the other. After this
118 first part was agreed upon, we went into the other room and
talked over the Schedule A lands. He and I went to Muskegon
for that purpose and for the purpose of consummating the other agreement.
I never informed Buchtel or any other party that I had ever
been on any portion of the lands in 21–7 prior to that date (Sept. 25th,
'74).

Cross-examined:

This stumpage matter was all talked over, as I have stated, at Saginaw between Buchtel and me in the office of the gentleman who drew the papers, I think in his presence, and I think his name was Gage.

Samuel Tiffany:

I reside at Muskegon; know the def't; know Lyman G. Mason. My
business is scaling logs; have been at it 15 or 16 years. I know the
lands described in Exhibit A. I scaled the logs cut on those lands last
winter. Green & Mason put in the logs on sect. 24; Aaron Miller on
sections 8 & 18. I did the scaling on both jobs. The total No. 1 and
No. 2 logs on those jobs was 1,162,543 ft. I have the tally sheets
119 with me made from that scale. (Tally sheets rec'd evidence
marked H 1, H 2, H 3, H 4, H 5.) I scaled all that was cut and skidded
on those lands. These scale sheets correctly state the quantity of No.
1 and No. 2 logs skidded. I should say that there was of the lands cut
over perhaps 10% of the timber worthless, both cut and uncut. That
is about the general average of worthless pine in that quality of pine;
of the same quality of timber on 21–8, the proportion of worthless was
about the same, and the proportion of No. 1 & No. 2 was about the same.
No. 1 logs were stamped with clover leaf on the end, No. 2 marked house
& N. O. T.

Cross-examined:

I did this scaling for the Mason Lumber Co. The scale sheets are in my handwriting. I filled this blank from the original figures, and part of it has been compared since. These are not the original figures. They are the figures I made from my memorandum at the time of scaling. (Witness explains to counsel how he scales logs by straight marks in the proper column in the scale-books.) And I made my scale-
120 sheets from this scale-book. I sent my reports to the Mason
Lumber Company of the scale. I think there was no timber cut down that was not scaled; there may have been occasionally a tree through the woods. There may have been 3 or 4 per cent. of trees cut down and not cut up. I made no estimate at the time. The balance of the ten per cent. I have named would be the rotten logs that were not cut and some that were cut. I scaled some logs with defects in them; made deductions for the defects. We used Scribner scale. Another scaler could take my scale-book and tell by looking at the logs what deduction I had made, as the No. of feet would be marked with a lead-pencil on the end of the logs.

The amount I scaled there was 1,162,543 feet. L. G. Mason had a part of the logs I scaled in 21–8. McNiff scaled in 21–8. I scaled about 1,000,000 in 21–8. A part was marked N. O. T.; a part, clover leaf triangle. No. 2, part with a house mark; those McNiff scaled marked O. X. S., part $\boxed{\text{S S}}$. The clover-leaf logs on 21–8 were No. 1 logs. The O. X. S. belonged to Eldred; $\boxed{\text{S S}}$ I think, to Bronson; the other marks to Mason Lumber Co. I marked some logs N. O. T. in
121 21–7, and scaled them—those scale sheets show. I supposed those
last named belonged to Bronson. There was 58,019 feet of them and is included in the gross sum I have named. In scaling, the amount which is upon the scale book is dependent entirely upon the judgment of the scaler. He scales the logs sound. You cannot detect the scaler's errors without a rescale.

Redirect:

Witness looks at the colored portions of sections 8, 18, & 24 on Exhibit C, and says: That appears to be the location on the sections I scaled. A portion that I scaled in 21–8 was upon certain railroad lands Bronson had obtained after the Eldred lands were scaled.

Recross:

I know nothing about the lines of those lands. There was something over 6,000,000 feet on the railroad lands, and 377,000 off the Eldred lands. No. 1 & 2 logs of the N. O. T. logs on 21–8 def't had nothing to do with, 167,000 ft.

WILLIAM BUCHTEL, the plaintiff, called on rebuttal.

In answer to questions put by counsel for plaintiff says: The
122 contract Exhibit A was drawn at East Saginaw, but not com-
pleted; drawn by Col. D. W. C. Gage on the 23rd Sept. '74.

On the 22nd Sept., '74, I rec'd two telegrams from Bronson; one from Akron, Ohio, the other from Cleveland. The Cleveland one was signed by my brother. Same day I rec'd two telegrams from Eldred; one from Akron, Ohio, the other from Cleveland.

On the morning of the 23d Sept., 74, Bronson came to see me at Capt'n Gardner's, in East Saginaw. He said he understood that I was dissatisfied with the sale of lands I had made to him—other lands. I told him that I was, and wanted him to secure me for these lands. He replied he would if I would sell him these lands on 21–7 described in Exhibit A. He then and there told me the Big Rapids Imp. & Man'f'g Co. was worth $250,000.

(Here the referee noted an objection for deft. as to all this class of testimony, as being immaterial and irrelevant, and exception for defendant.)

I told him I wasn't satisfied, and wanted him to secure me on those lands in 21–8. He proposed a mortgage on those lands—Eldred lands—if
I would sell him those in 21–7 (witness identifies the mortgage).
123 (Mortgage received under defendant's objection and marked
Exhibit G.)

His proposition was to give me a mortgage subject to the Eldred contract for 2½ million feet, and the first payment due on that land contract he would pay when it matured; and for the 2nd payment coming due he would assign to me the two payments on the Eldred contract (i. e.), the first payment he would assign to me and so much of the 2nd paym't as would pay the note coming due upon that purchase. Gage drew up a contract, but Bronson would not sign it until he drew up A. He would not sign G until A was drawn. Then when A was drawn he refused to sign it with the clause in it prohibiting the cutting of timber. Another clause was added, that the logs should be marked a certain mark, and we retain our lien on the logs, but he would not sign it, &c. Col. Gage in the afternoon drew up A, under my instructions. Bronson then said he would like I would go with him to Big Rapids that afternoon. As my mortgage was not signed I went there to have that completed. I went with him and to his house and went to bed. The next morning, the 24th, I went with him up town; took quite a walk to his dam and
mill, and when we came back went to Brown's drug store, and
124 Bronson said he had just got a letter from Mason, and said he
would sign the mortgage if I would sign A, and we did so, and
the papers were executed that day at Brown's drug store. I took the mortgage and one duplicate of A. He then wanted I should go with him to Muskegon. He wanted that clause stricken out in relation to the cutting of timber, before the signing. He asked this at Saginaw and Big Rapids. I told him no, unless he could secure me he could cut no timber. He went to Muskegon that afternoon.

The import of the letter was that Mason wanted to make a contract for logs. We got to Muskegon, stayed at Occidental, and Mason was said to be at Grand Rapids. Next morning after breakfast he introduced me to Mason at Occidental Hotel. Before going to Muskegon, Bronson told me if I would go may be he could make arrangements to secure me, and I could give him permit to cut timber on the A lands. I think Mason and Bronson then had an interview. I didn't interfere.

I made a few inquiries in regard to the responsibility of the Mason L. Co. that morning and visited the mill, &c.—nice dry kiln—between
9 & 10 a. m. I went with Bronson to Mason's office. Bronson
125 and I had been together all the time. I think Mason came in
soon after we went in.

I then stated to Mr. Mason that he perhaps was aware that I had sold to Mr. Bronson some lands, or the Imp. Co., and that he was anxious to cut them and wished me to go down to see whether there could be any arrangement made whereby I could give him permission to cut. I think we were in the east room in the office. I then told Mason, from what I learned and seen, that if he would guaranty the payment of this contract A, I would give him permission to cut the timber. Mason said

that he and Bronson had some business that they wished to talk over privately, and I left the office, went to the mill, stayed around perhaps half an hour, then went back to the office. Bronson and Mason were in possession of that private room. No one else had been in there. I know Monroe; he had not been in there prior to my going out, and no papers shown prior to that. When I returned I stopped awhile with Monroe in his room in the office and I looked at some brine. I was then invited into the room; I think, by Mason; am not sure. When I got in,
126 Bronson met me and said: "We have now fixed an arrangement so that we can have it all fixed up;" Mason present; and Mason then went to work and drew up this paper, or wrote it in pencil, Exhibit B. He then read it over, and I told him I thought it would be satisfactory. He then called Monroe into the office and handed him the draft of it and told him to copy it. Monroe took it and went out, and we sat there.

By the way, when I came back this second time I saw the plat C there. It was sp'ead out on Mr. Mason's table, and another plat of 21-8. I had not seen the plat prior to going into the office.

While we sat there and Monroe was copying the papers, Mason asked me if I had any lands up there. I told him I had; and we looked at a map—railroad map. I had no plat with me. We were talking land while he was copying this. While this copying was going on there was nothing said with regard to the lands in "A" until about the time of signing the instrument Exhibit B. When Monroe brought it back into the office—Mason's office—I took one of the A's out of my pocket and I attached a copy of B to it. Mason then spoke and said that he supposed this would be all right if the quantity of timber was
127 on the land; and I said, judging from the anxiety of Eldred and Bronson to get it, I thought it was a good thing, though I had never seen it. I had never seen the lands. Nothing else said on that subject.

I should say Monroe was absent making the copies 10 or 15 minutes; but a short time. I think B was signed about 11 a. m. When B was signed and attached to A I took one and put it in my pocket; I then got up and told Mason I would like to see him, and we walked out together and went into his barn and sat down. I then told him I had understood in some way that he was to get timber off the first purchase, and that I had a mortgage on that land of Bronson, and proceeded to tell him. He said he was glad I told him. We then went to the salt well; then to the office, and he drew up this or drafted it, and we sat right there till this was drawn up, read over, and signed. I think Bronson was present. I took one copy and Mason the other. No other contract was looked over or talked about after we came in this last time. This was done about 12 noon. I went to the hotel and took dinner. Nothing up to this time had been said to me or in my presence
128 about quantity of timber, except the remark I have stated that Mason made about the time Mason handed me A and B attached together, and no reference to plat C by them in my presence or by me up to this time excepting when I made the remark to Mason that judging from the anxiety of Bronson and Eldred to get this piece of land, it must be a good thing—was a good thing. Bronson, then speaking, said he had it all looked over and told Mason. Didn't go to def't's office after dinner that day. Don't think I saw Mason & Bronson together again that day. I had no talk with them together after that.

Q. Where did you go after that?

(Objected to for defendant, incompetent. Objection overruled and exception taken for defendant.)

A. I went with Eldred to his mill towards the mouth and stayed with him till supper was over, and got into his buggy and drove to the hotel and had supper. After supper I interviewed Eldred on stoop of hotel. I left town on evening train; can't say what time. Did not go again to def't's office. Prior to seeing plat C in Mason's office, I think it was 18
months or two years that I had not seen it. C had been out of
129 my hands so long that I would not like to state in regard to the
figures upon it. I copied the figures from this plat into my plat-book, and these figures do not now agree with the book. At the time I made the copy correct. That was three years ago last August. The plat was in my hands all the time till I gave it to Miller, and had not been altered when I handed it to him.

I made no reference, as I remember, to C at defendant's office. Don't remember having it in my hands that day. I had never visited these lands prior to Sept. 25th, '74. I knew nothing of the quantity of timber on the lands, only from report of what was marked on the plat. I didn't know anything of my own knowledge—anything about it.

(Witness here identified his own plat-book in which he made the copy of the figures.)

Q. Turn to those pages which represent the lands marked upon the plat in sect's 8, 18, and 24, and state as to what figures you find there having been copied by you from that plat to that book at the time you speak of, and state if there is any difference between those figures as
they appear on the book and as they now appear on the plat.

130 (Objection for def't as immaterial, irrelevant, and incompetent
for a party to show his own acts.)

REFEREE. You claim he produced a plat with these figures on it?

Mr. CHAMPLIN. Yes, sir.

REFEREE. He claims that he did not produce any such plat. I think I will take the testimony subject to the objection.

(Objection overruled and exception taken for defendant.)

A. On sec'n 24 the estimates are 1,200,000; on sec'n 18 1,900,000 f't, and on sec'n 8,800,000. The timber is marked good. I copied these figures from this plat. The copying was done when I bought the land. I copied the estimates from the plat on to the book.

(Plat-book submitted for inspection and figures offered and rec'd.)

Witness further says in answer to question: I never owned sec. 4. I supposed I did until I examined my plat-book about 3 years before the execution of A. The first intimation that I had that I could dispose of the A lands to Bronson was on the 22nd Sept., '74, at East Saginaw. I had had no talk prior to that with Bronson that I could or would sell him those lands.

(All this talk with Bronson taken subject to objection by def't;
131 testimony allowed to stand, and exception by def't.)

I was going to say Bronson did not ask me at my place when he bought the first lands. I did not go to East Saginaw on the 22nd to sell those lands to Bronson. I got an impression, or understood from some one, that Bronson was making a contract at Muskegon with def't to cut their lands on 25th Sept.

Q. As to whether at Big Rapids prior to your going to Muskegon on the 24th Sept. you had been informed by Mr. Bronson or any other person that such a contract was extant?

(Objection by def't as incompetent. Obj't'n overruled and exception for def't.)

A. I didn't understand there was such a contract, but I did understand that he was trying to negotiate for one, to make one; that he could make one if he got the permit to cut. There was no understanding or talk that the contract A was to have something further done to it, when we got to Muskegon, to complete it. It was at Bronson's suggestion I went to Muskegon and for his benefit.

Q. State whether subsequent to the execution of this contract B you had a conversation with Mason in relation to the payments on contract A.

132 A. I did have an interview with him.

Q. When and where did that interview take place and what was the subject of the conversation, as near as you can?

(Objected to for def't, as incompetent to show what Mason said with reference to this matter, and if material, was a part of pl'ff's original case and def't not bound by what Mason may have said at that time. Objection overruled and exception for def't.)

A. I had at Muskegon; cannot give the date. About the middle of January, 1875, I had a talk with Mason in regard to the first payment, then past due. He told me they had been making pretty large advances. I said to Mason, I should like to have the pay't that came due Jan'y 1st. He said they had been making advances on logs, and that he had made arrangements with Bronson that he was to pay me $1,000 out of the Feb'y 10th pay't, $1,000 out of each pay't until this first pay't was paid.

I made no representations at the interview at Mason's office on the 25th Sept., as claimed by Monroe in his testimony as to the quantity of timber on the A lands, nor as to the figures on the plat C, nor any like representations thereabouts.

133 Cross-examined:

In answer to questions by def't's counsel, witness says: I think the conversation I have last referred to, in chief, was about the 16th Jan'y, '75. I cannot say when Mason first claimed the timber did not hold out on the land. He spoke of it in March, but I think he wrote about it before that.

Witness is shown his own plat book again, and he says: The writing in pencil there is mine; I wrote it and made the figures. I did not make the footing figures. They were made by George Crouse. Crouse was partly interested in the lands. I did not write the word "sold." I did not own on sec. 4 when that was written. I got plat C from my grantees; that was Louis Miller, Jacob Miller, George W. Crouse, and John R. Buchtel. I cannot say how long I owned the plat-book before I discovered I did not own sec. 4. I think Crouse discovered that, and think he wrote the word in pencil, "sold." That page is the same as it was when I took the book. The figures I put there in pencil have not been altered to my knowledge. I had no one look at these lands to

134 see how much pine there was; 3,000 acres had been looked, but not for me. I never saw these lands. I bought them from these estimates. Bently put these estimates on plat C. He purported to have located the lands, and when they came into my hands they had the figures on the plat the same as I have transcribed them into the book. I did not change the figures from 1,700,000 to 1,900,000 on sec. 18. I first wrote it 1,900,000.

COUNSEL (to referee). Look at that now and you will see that it was 1,700,000 and has been recently changed to 1,900,000. This book has recently been in Taggart's office. I showed Mason this book since

this suit commenced. He took down the estimates. I cannot state in whose figures the 1,200 are on sec. 24. I suppose them to be Bently's. I did not have this plat at Saginaw, nor this plat-book. I did not exhibit any plat to Bronson there. That plat has never been in my hands since I gave it to Miller. I don't remember seeing plat C when at Saginaw. At home I had a pocket plat-book. I think Bronson had a description of the lands at Saginaw. I don't recollect what we used to get the description from at Saginaw. Bronson may have had
135 plat C there. The words "cork and sap," written on plat C, I think, is Bently's. The figures 680, 18, at the bottom of C, I don't know whose they are. They are not mine.

Bronson and I agreed upon the price per acre at Saginaw, $18.00, and figured up what it came to. I don't know if the figures on plat C were made at that time; they are not mine. Bronson refused to execute A till he got to Big Rapids. I went to Big Rapids to get the mortgage executed. I went there to get security on the lands I had sold Bronson without security on lands in T. 21, 8, and went to Muskegon at his request. Before leaving Big Rapids I had an idea of having security from def't if they were responsible. The sale of the A lands was a complete and absolute sale before we left Big Rapids; I had an opportunity to sell these lands to Eldred for part cash. I think Eldred was good. The reason I sold to Bronson instead of Eldred was Bronson would secure me on the Eldred lands if I would do so. No understanding between Bronson and I before leaving Big Rapids that he should get def't to give further security on the Eldred lands. There was nothing said between Bronson and I about the mortgage matter. I
136 told Mason after the other matter was closed up that I held a mortgage on the Eldred lands; that I understood, either by Bronson or Mason, that def't was to get some logs off them. He said he was glad I had told him. This was after we had completed Exhibit B, and I had it in my pocket. Mason and I were at the barn and had this talk.

I did not know what he might do about guaranty if I went with him, Bronson, to Muskegon. He; Bronson, said he could get a contract to sell some logs, and wanted me to go with him to see if he could make some arrangements and get a permit to cut on those lands. I did not know that Bronson had a contract to sell the logs. I understood him to say that he had just rec'd a letter from def't and he was going to sell def't 4,000,000 feet of logs, or some amount. I don't remember if, when in def't's office, on the 25th Sept., anything was said about my not being the owner of sec. 4. I know nothing about the substitution of sec. 24 for sec. 4. I think I had never represented to Bronson that I owned sec. 4. I did not make the figures 1,000 on sec. 4. Don't know how the 1,000 came on sec. 24. Was not there when I made the copy. I did
137 not put them there afterwards. We met at def't's office between 9 and 10 a. m. of the 25th of Sept., '74. After I got into the office I told Mason that I had sold Bronson some lands and he was anxious to cut them; that he was anxious that I should come down and see if some arrangement could be made to give him a permit to cut; and I told him from all the information I had got of their business and responsibility, I was willing, if they would guaranty that contract, to give him permission to cut the timber; give the Mason L. Co. permission to cut. I understood Bronson was to put the timber in; that was my impression; and I was to give the defendant permission to cut. I understood the Mason Lumber Co. took the lands; that Bronson was going to assign his contract, and it stepped into his shoes.

I have stated that, after making known my business there, Mason

drafted Exhibit B, in pencil, by which I claim he guaranteed the payments in contract Exhibit A, and about the time B was executed and handed me, Mason made the remark, it would be all right if the timber held out. I think this remark of Mason was not before the
execution of B. I think Mason attached the two together and
138 handed them to me and then said, this will be all right if the
quantity of timber is there.

Q. You think Mason had engaged to pay $12,000 and upwards without raising the question as to the quantity of timber till afterwards?

A. I can't tell you what I supposed. Mr. Bronson had told him. I have no recollection that before the execution of B he asked me how much timber there was on the land, and I, or Bronson in my presence, told him how much there was. I recollect distinctly, he made the remark, if the amount of timber was there that this would be all right. I had no idea what he referred to. I think plat C laid on the table when I came back to the office after I had been in the office that first time, and I had not examined it, nor looked at it, as Mr. Bronson knew I hadn't seen the lands. I supposed Bronson knew all about it. I don't remember when I first discovered the figures on my book and on C did not agree. I discovered it in the Mason House last winter. I think Bronson showed it to Crouse. I then discovered the amount had been raised on 24. It is not a fact that I took the amount from Muskegon
and compared them when I got home. I have not told any one
139 that was the fact. It was later, I think, in March; am not sure
if in March or January, I don't remember. I told Mason of the
fact, but I cannot say when. I told him here the other day.

Q. Do you not know that Mason, in behalf of the def't, entered into this agreement B, on the strength of the quantity of timber designated and marked on Exhibit C, as they appear there to-day?

A. I don't know, sir, from my own knowledge, whether I did or not.

Q. Didn't you know that at the time this plat C was exhibited in the Mason Lumber Co.'s office at the time Ex. B was executed, that that was produced there as your plat?

A. I think I saw the plat there.

Q. Didn't you know that Mason was informed that that was your plat?

A. Well, I supposed he was, but he was not by me. I supposed he was. I only know that Bronson said he had looked the lands over, and I supposed he told it.

Q. Did you represent then that there was the quantity of timber on the land which you have testified as having taken from the plat?

A. I did not, sir. I could not state what there was. I made no rep-
resentations as to the amount of timber. All the representations
140 I did make was that I judged it a good thing from the anxiety
of Bronson and Eldred to get it. I did not furnish the figures
on that plat to Bronson. Bronson made no representations as to the quantity of timber on these lands in my presence, that I recollect of. I don't remember that at the time I thought them correct but afterwards found they were not. Bronson told him in my presence that he had looked the lands over, and knew what it was. At the time I made the remark "I thought it a good thing" he did not state in my presence how much there was. I left the office after first going in, and before Exhibit B was signed. Was gone half an hour. I went out after I told Mason I would give them a permit to cut if they would guarantee the payments of the contract, and he stated he and Bronson had some business, and intimated it was private, and when I came back this

paper was drawn up. After I came back this was written. Bronson told me he had made an arrangement and assigned his contract over to secure Mason and he would guarantee the payment of it.

Nothing said after I came back about his becoming security on contract A. I was gone perhaps half an hour before returning. I
141 sat down a short time with Monroe and they invited me in. I
learned somewhere, I don't know where, that they claimed that there was on those lands 2,200,000 feet of timber more than my plat-book showed. I can't say where I learned that fact. When I did I referred to my book to see if it was correct. I was at home at the time. As I understood, defendant took an assignment of contract A as security. I did not consider the goodness of the security would depend upon the quantity of timber upon those lands. At the time I sold this land I supposed they were getting timber off the other piece, and I supposed that it had the amount of timber that was estimated on it, but I didn't know then what the estimates were. I had no plat book with me. I went to the Eldred mill right after dinner and stayed at the mill with Eldred all the afternoon. I think those marks below the section on plat C have been put there since I had the plat.

On section 18 they are marked up 1,000,000. Section 8 should be 800,000 instead of 1,800,000. I think sections 8 and 18 on the plat were marked as I have them marked in my plat-book; i. e., some of it was marked cork and sap and good farm lands, some of it G. F. I cannot see that any figures have been rubbed out on sections 8 and 18.
142 I do not recollect the conversation with Thomas Munroe after my
return from the Eldred mill to the effect that I had been to see some of Eldred's good lumber. My recollection is, Eldred drove me right up to the hotel, which I did not leave till I went to the depot. I don't know that we got back a long time before supper. I think the train left about dark. I saw Eldred's son at the mill and G. W. Robinson.

Q. Didn't you know at the time Mason was signing Exhibit B that the defendant had a contract with Bronson for the pine on the Eldred land?

A. I did. I got that information some way, but I don't remember just now. I don't know why I did not inform Mason of that before he signed Exhibit B. It occurred to me just after the thing was done, and I took him out and told him. We went to the barn. Saw horses there. Didn't look at them. Saw a man there cleaning harnesses, or something of that kind. I think we sat down in the harness room. I don't think the other man heard the conversation. This was about 11 o'clock a. m. The conversation with Mason about the first of January payment on, or about the 16th of January, was in Mason's office, and Crouse was
143 present. I don't remember that any one else was present. This
was before I went to Big Rapids. Crouse was not interested in the lands but was in the avails of them. I don't know that I have Mason's letter of Febr'y 27th. I received such a letter from him.

(Copy of the letter produced and marked Exhibt I. Letter from Buchtel to Mason of March 3rd, '75, introduced and marked Exhibit K. Another exhibit marked L introduced.)

Exhibit G is the mortgage of the Eldred lands I took on the 24th of Sept. '74. I was satisfied with that security; had no idea of obtaining any further or different security on the Eldred land. Carried that mortgage to Muskegon with me; did not record that mortgage till I got the stumpage security of $2.50 per M upon those lands from def't. I think I showed the mortgage to Mason at the time; it was recorded the 28th of October, 1874. I never have received anything on it.

Q. Now will you state how it came about that Mason, in Exhibit F, agreed to pay you stumpage of $2.50 per M for such logs as he should get on that contract with Mr. Bronson from the Eldred land, if there was no figuring done in the Mason Lumber Co's office upon that occasion as you have testified ?

My recollections now are, when Mason and I went out I showed
144 him this mortgage, Exhibit G, and told him what my relations
were in that regard. I think I made a full statement of the whole transaction between Bronson and myself with regard to the first sale that I made to him.

I told Mason I should not let Bronson cut timber covered by that mortgage, unless the $2.50 M stumpage was secured me. I told Mason I was satisfied there was 5,000,000 feet of timber on the Eldred lands. This was at the barn. Eldred was to have 2,500,000. I supposed those lands were good security to secure Bronson's pay't on the Eldred purchase after Bronson had taken care of the first payments, i. e., that there was enough timber after Eldred cut his to make me good on the purchase. I got that estimate from the estimate of one Lux; it was not copied on my plat-book. I now recollect there was some talk about quantities of timber there that day with Mason, but it was confined to the Eldred lands. I fixed the price per acre in both towns alike, and at that time regarded both towns about the same quality and quantity. I think I had these lands in both towns in my pocket plat-book; it had no estimate
of quantity upon it. I don't know how I got at the amounts as to
145 quality and quantity to fix the value. I don't remember how many
copies of Exhibit F were made. I started for home on the evening train on the 25th of Sept., 1874. Saw Bronson at the depot when I left. He went with me to Grand Rapids.

(Telegraphic dispatch from Buchtel to Mason Lumber Co. rec'd in evidence, marked Exhibit N.)

I was at Muskegon the 14th of Jan'y, 1875; went thence to Big Rapids; sent the telegram Exhibit N. I did not go to Big Rapids at that time for the express purpose of getting Bronson to turn out to me the Eldred contract to apply on the first payment mentioned in Exhibit A. I wanted it to secure Bronson's note, due in Jan'y on the 21, 8 lands. I sent that telegram for him to look after his interest; he had no interest in 21, 8; but he, Mason, had in the other and told me I should see how matters were running as near as I could and let him know, and I did. Telegraphed him; then wrote him when I came back from the camp (Miller's logging camp).

Redirect:

I have no other plat-book. Never had any other except the pocket one
named. Don't think Crouse has any other. At the time of send-
146 ing the telegram, I went to see Bronson and got him to pay me
the note due Jan'y 1st, which I had against him on the Eldred lands. I tried to get Bronson to pay the first payment on this trip; there was no connection between the Jan'y paym't (1st note) on the Eldred land and the first paym't on contract A land, and it has not been paid. There was no security on that. The amount of that note was for about $3,685.00 and the interest thereon at 10 %.

Further cross-examination of Buchtel:

When Bronson was at Akron and made the first purchase of me, I exhibited to him a set of plats, but not a plat of 21, 8 nor of 21, 7. Can't say from what we made the estimates of the pine on that occasion. Bronson said he had looked the land over in 21, 8. This was in July or August, 1874.

ELISHA ELDRED, sworn for pl'ff, in answer to questions, says:

I live in Chicago; in the lumber business. Know the pl'ff and def't. Know Stephen Bronson and L. G. Mason.

Q. Will you examine Exhibit C and state whether you ever saw that before, and when and where you saw it, and by whom it was exhibited to you, and whether it now compares in all respects with its con-
147 dition at that time?

(Objected to for def't as irrelevant and incompetent. Objection overruled and exception for def't.)

A. I could not swear exactly to this map. I recollect Bronson's showing me a map. I made no mark upon it, so that I could not tell it. Bronson showed me a map at Big Rapids one time of some lands that he was going to buy of Buchtel. This looks like the map. It was either in August or Sept., fore part of Sept. 1874.

Q. (Previous question repeated. Same objection as before. Taken subject to objection. Testimony allowed and exception for def't.)

A. I cannot swear that this is the identical map. It was similar to this. The section 24 upon it hadn't as much timber marked upon it as appears at present on this one. There was a million feet difference.

Q. What did that plat that he then showed you purport to be a plat of?

(Same objection by def't. Same ruling by referee. Objection overruled and exception for def't.)

A. Town. 21 N., R. 7 W. This was after my purchase of the lands from Bronson in 21, 8. I was in Akron, Ohio, in Aug. or Sept., 1874. Did not see Buchtel there; saw the plat-book. Crouse showed it
148 me, the same plat-book in evidence.

Q. I direct your attention to the lead pencil entries as to the amount on the several sections in the book which you examined; did you see such entries as these, I mean the figures on the right hand, bottom side of the page?

(Objection for def't, immaterial and incompetent. Same ruling as last above. Testimony allowed and exception for def't.)

A. Yes, sir; and made a memorandum at the time and have the memorandum before me now. (Looking at the memorandum.) I think this the same book I saw there. The figures correspond, except I see there is an alteration of figures which I got down 19 M on my book, which here looks like 17 M. I made a correct copy at the time I speak of.

Q. Please read your copy to the referee.

(Objection for def't, immaterial and incompetent. Taken subject to objection. Objection overruled and exception for def't.)

A. Sec. 24, 1,200,000, cork and sap; sec. 18, 1,900,000, cork and sap; sec. 8, 800,000, cork and sap. From Akron, O., I went to East Saginaw; thence to Chicago. Saw Buchtel at Saginaw and saw Buchtel at Muskegon some days afterwards; saw Bronson the same time at
149 Muskegon Can't state what day of the month. Saw Buchtel and Bronson together in the morning. I took an early dinner at my mill. I drove up and took Buchtel down to my mill in the afternoon; staid down at the mill all the afternoon. I brought him back to the Occidental just before supper time. I left my horse at livery stable and came back; could not say where Buchtel was when I returned; saw Buchtel that evening after supper; think we took supper together, but am not sure. We were on the stoop after supper.

Q. Whether about that some time you were desirous of purchasing these same lands in 21, 8?

(Objected to for def't, immaterial and irrelevant. Taken subject to the objection. Objection overruled. Exception taken for def't.)

A. Yes, sir; I would have liked to have bought them, and so told Buchtel if Bronson did not buy them.

Cross-examination:

In answer to questions by def't's counsel: It was at Saginaw. I told
Buchtel I wished to buy the land if Bronson did not. Have not seen
150 the plat-book till now since I saw it at Akron. Have no recol-
lection of any alteration of the figures when I saw it at Akron; my
figures are 19. I told Buchtel to-day about my having taken the
figures at Akron and gave him my amounts. Crouse showed me the
plat-book at Akron. I have no means of identifying it; its size and
general appearance is the same. I took other memorandum from the
book; my woodman had seen these lands and I was desirous of getting
them. My woodman had not seen sec. 24, and did not examine them as
to quantity, but as to quality. I supposed the estimates I had from the
plat-book were correct and they footed up 3,900,000. Buchtel told me
the price per acre was $18.00. My desire to purchase these lands was
based upon the quantity estimated and the price he asked for it, from
what my man told me as to the quality of *of* timber. If upon examina-
tion I found there was 3,900,000 feet on it, I would have taken it.
Would not have relied upon representations of quality and amount, with-
out a guaranty or something of that kind.

AARON MILLER, sworn for pl'ff, in answer to questions, says:

Q. Did you go upon these lands in town. 21, 7, in Sept., 1874,
151 for the purpose of examining the timber?

(Objection for def't, immaterial. Taken subject to objection. Objection overruled. Exception for def't.)

A. Yes; between the 5th and 10th, 1874. It was before I went on the lands with McHenry, as he had testified; McKinnon and Judd Robinson were with me. Robinson and I examined on sec. 8, and Robinson, McKinnon, and I went on to section 18. I went to visit the lands with a view of putting in the timber. I did put in the timber on 8 and 18; went at Bronson's request.

Q. State how it was as to being rotten.

(Same objection for def't as last above. Same ruling by referee. Objection overruled and exception for def't.)

A. I should think very near one fourth with what deductions and all that would be made, as near as I could judge, ¼ rotten.

Cross-examination:

In answer to questions, witness says: I never saw a piece of land
that turned out so much rotten. I never cut any of the same class of
timber as I know. I have had 19 years' experience seeing timber cut;
my estimate is large, very large, but I think it is what it would
152 actually cut rotten. There is more or less rotten timber in all
tracts.

Q. And that is taken into consideration in making the estimate?

A. You generally estimate what sound pine there is. We calculate to estimate what sound timber there is

Q. If you should go into the woods to report the quantity of timber as well as the quality, would you take into account and make deductions for rotten timber?

A. Yes, sir; in looking at such a tract as this I would take into consideration the unsound timber. This timber did not cut as sound as it looked; it was too old. You cannot really tell how timber will cut until you cut it. I can tell from looking at it whether it is going back or not. (Witness described how it would look.) I cut all the timber on this land as near as I could without its being surveyed. I do not say there was one-fourth of the timber left on the ground; a good many logs that was badly defective; some that were taken for half and some for just what was in them. They were scaled so as to make sound timber.

DUNCAN McKINNON, sworn for pl'ff, says: Have been lumbering some years.

153 Q. State as to whether some time in Sept., 1874, you accompanied Miller on some lands in town. 21, 7.

(The answer to the question taken subject to objection as irrelevant and incompetent for def't. Objection overruled and exception for def't.)

A. I did; between the 5th and 10th. I went at Bronson's request, with a view of putting in the pine by the M. Am not sure that I have heard them called the Eldred lands; these 21, 8 lands. I looked over sec. 2.

(Objection overruled and exception for def't. This testimony taken subject to objection.)

I estimated the quantity upon the lands. I visited and told Bronson the estimate within 24 hours; I think at Clam Lake. I can't give my estimate of the different lots; I took his estimate according to what he had on his plat, and my estimate was just ½ as much in both towns, and so informed Bronson; that would make about 6,000,000 feet in both towns. The pine on the two sections was old and should have been cut 50 years ago. I think Bronson, at this time, was on sect. 4 in 21, 8. Informed Bronson, as I have stated, on or before the 15th of Sept., 1874.

Cross-examination:

154 I visited sec's 2 and 4 and sec. 9 in town. 21, 8, and I looked over sec. 18 in 21, 7. That is all the land I looked over. My representations to Bronson was with respect to all I had looked over. It is admitted that sec. 9 is no part of the land in this case. I cannot tell you what the figures were on the plat on the lands I visited. I simply told Bronson it would be ½ what he had on the plats; his estimate was 10,000,000; mine, 5,000,000. My estimate was 5,000,000 on sec. 18 in 21, 7; sec. 9, 4, 2, and 8 in 21, 8.

Redirect:

I did not visit sec. 24 in 21, 7. My estimate included all the lands in that section. I did not base my estimate upon actual examination of all the land, but on 3 or 4 sections in the two towns. I found that it was going to fall far short of his estimates, and based the others on what I had looked at. I did not look at secs. 8 or 24. I grouped the lands altogether. I have never seen sections 8 and 24 in 21, 7. Been in the lumber business for 8 or 10 years. If I were buying pine land today I should have assistance in estimating it. That was my first acquaintance with Robinson.

155 **L. G. MASON, recalled on rebuttal for def't. Rebuttal says: The first time we went to the barn it was not a great while after**

we first met, and had a sort of general talk in the office, and Buchtel nodded me out, and we went out. No conclusions were arrived at previous to the scene that he related in the barn. No paper had been drawn; that I am sure of as I am sitting in this chair. I refer to the time Buchtel says he spoke to me of the mortgage upon the Eldred lands. There was 2, and I think 3 copies of Exhibit F, one for each of the parties. Haven, the bookkeeper, made the copies. It would take him $\frac{3}{4}$ of an hour for each copy. I saw this plat-book of Mr. Buchtel's in this city about the time we commenced this trial; saw it in this office. Examined the description of lands named in Exhibit A. Buchtel handed me the book, I think. We looked it over together. I examined the quantities as set down in pencil on the plat-book, and made minutes of it at the time. Took the amounts down in Buchtel's presence. Section 8 read 800,000; sec. 18, 1,700,000; 24, 1,200,000. I compared the figures with these on Exhibit C, and found the difference 2,000,000 feet;
156 that 24 and 8 had been raised each a million. Buchtel and I talked about it at the time. I heard the testimony of Buchtel respecting the interview he had with me in Jan'y, 1875, in which he says I promised to make a payment which matured in contract A in installments from month to month. Buchtel is mistaken about my making a promise. I showed him the authority I had from the Big R. Imp. and M'n'f'g Co. for appropriating certain portions of payments that would mature to them under that contract, provided they went on and fulfilled the contract; at the same time showed him a copy of a letter that I had written him, which had probably passed him. This authority is Exhibit L, and the letter is Exhibit E.

(Letter from Buchtel introduced, rec'd, and marked Exhibit O. Letter from M. L. Co. to Buchtel, April 16th, introduced and marked Exhibit P.)

Referee. State the facts out of which that telegram arose.

A. Mr. Buchtel was at Muskegon at our office, and I showed him a letter that I had written of date of Jan'y 13th, and a letter of authority from the Big Rapids Imp. and M'n'f'g Co. to appropriate certain amounts of future payments towards the payment of the first instalment
157 of that contract. He left for Big Rapids to look after the business connected with that contract; perhaps some other business. I don't know.

Q. Before he went to Big Rapids, was there any talk between you and him in reference to the Eldred contract that Bronson held and his efforts to get it; did he say anything about it; and, if so, what did he say?

A. My recollection is not very distinct. I think it was spoken of as likely to be of value. Something to be coming to the Big Rapids Improvement and Man'f'g Co. I don't recollect about that. I think the interview was rather short. I don't recollect distinctly about it.

Witness looks at Exhibit N, a telegram, says: I cannot recall the circumstances sufficiently explicit to state what he meant by the telegram.

Q. Will you state what was the fact as to whether the paper marked Exhibit B was an absolute assignment or security?

(Objected to for pl'ff as incompetent. The paper will have to speak for itself. Objection sustained, and exception for def't.)

Q. Do you know, and if so, state, whether at the time Exhibit B was executed the parties thereto had any conversation as to whether the contract A was to stand simply as security to the Mason Lumber Co. in case they had to make any payment of Exhibit B.

158 (Objected to for pl'ff, incompetent. The paper speaks for itself.

2nd. The ground has been gone over by both parties. Objection sustained. Exception for def't.)

I think I next saw Exhibit C in February, 1875.

Cross-examination:

I have no doubt that it was a part of Buchtel's business in going to Big Rapids from Muskegon in January *was* to see if he could not collect from Bronson or get him to secure the first note past due on the Eldred purchase, but I think also the first payment on the other purchase, or else he would have had no occasion to write me. If he told me that he was going to the woods, I presume I requested him to write me how they were getting on there. I have no recollection of it, however. I was not trying to get hold of the Eldred contract at this time, and I did not inform Buchtel at that time that I wanted to get it. I took a contract for No. 2 logs; but it was much later than this.

GEORGE W. CROUSE sworn for pl't'f.

159 I reside at Akron, Ohio. Know pl't'f. Met L. G. Mason once before in the office of the Mason Lumber Co. in Muskegon, Mich., about the 15th day of Jan'y, 1875; present, Mason, Buchtel, myself, and another person part of the time.

Q. Please state what took place between Mason & Buchtel at that time and place in your presence, relative to any payments or conversations relative to payments upon what is termed here contracts A & B.

(Objected to for def't as immaterial and incompetent. Taken subject to objection. Objection overruled, and exception for def't.)

A. Mr. Buchtel asked him first for money or for notes that he could use in payment of the pay't then due. Mason 1st replied that Bronson had been there a day or two before, and that he paid him that day all that was due him by the contract between Bronson and Mason up to that time claiming more than was due him; therefore, at that time didn't wish to advance any more, but would pay Buchtel one thousand in Feb'y 10th, and thereafter on each succeeding pay day until 1st payment made. I was there at Buchtel's request to aid him in securing several claims.

(Taken subject to objection for def't. Testimony allowed and exception for def't.)

Q. What claims were they?

(Objected to as incompetent for def't. Objection overruled and exception for def't.)

160 A. 1 claim against Simpson & Norton, of Grand Rapids; 1 against the Big Rapids M'n'f'g Co.; another against the Big Rapids M'n'f'g Co., guaranteed by the Mason Lumber Co. The first of these was a payment due on land purchase in town. 21, 8. I understand the nature of the claim against Big Rapids Imp. Co., and the one guaranteed by the Mason Lumber Co., and I understood the Eldred contract matter.

Q. Now, then, state what was said in relation to the Eldred contract, if anything, at the time that you and Buchtel had the interview with Mason, at his office at Muskegon, Jan'y, 1875.

(Objected to for def't as irrelevant and immaterial. Objection overruled, and exception for def't.)

A. As near as I can remember it, when Mr. Mason said Bronson had been in his office a short time before and he spoke of having blowed up Bronson for his misrepresentation and called him hard names, and that he tried to get Eldred's log contract assigned to him to secure him, but

Bronson told him that he had used that contract and could not give it to him, he then took the other security which he exhibited to us on that occasion.

Q. What, if anything, was said at that time in relation to Bronson having misappropriated the money which Mason had at that time
161 advanced to him in furtherance of this job?

(Objection for def't, immaterial, irrelevant, and incompetent. Objection overruled and exception for def't.)

A. I can't give his exact language, but he charged him with both misappr'iating and misrepresenting. I remember one thing was representing to him that he had cut some timber from another piece of land not embraced in the purchase, claiming that he had paid for it; that Mason afterwards learned that he did not pay for it and therefore Mason paid for it, giving that in the same connection as one reason why he had advanced more than he expected to advance on the payments then due; that the pine was represented to have been bought from a railroad co.

Buchtel informed Mason he was going to see Bronson in relation to the payment which was then due him on another purchase. Buchtel was to ascertain what had been done with the Eldred contract, and Buchtel was to advise Mason of whatever he learned that would be of interest to him; there was more general conversation which I don't recollect. Mason said he took an assignment of another class of logs to secure his advances; he claimed that Bronson had not used all the money advanced legitimately in the business. I did not go with Buchtel
162 to Big Rapids. I went 2 or 3 days afterwards. Their converse was friendly.

Cross-examination:

The paper Mason took as security was on No. 2 logs; can't say the amount; can't swear positively what the paper was for as to Mason. I think it was to secure money advanced by Mason to Bronson on some contract which existed between Mason and Bronson for putting in logs. I never saw that contract; all I know about it is what I heard on that and other occasions. I was familiar with the transaction. I had never heard Mason mention that contract in any other manner before. This conversation lasted not to exceed 2 hours. It was in the Mason Lumber Co.'s office. I saw Bronson's receipts and contract. The receipt was for from $11,000 to $13,000. I could not say it was $16,000; think it was $13,000.

Mason showed this contract for the purpose of showing payments he had made to Bronson on it. All the papers I remember seeing then was the main contract and the subsequent contract. The main contract had the receipts on it; the subsequent contract was an assignment by Bronson to the M. L. Co. of a certain class of logs. I am sure of this. I wish to correct my testimony by saying that Exhibit L is
163 another paper that I saw there. I think very likely we did ask Mason for short paper. I am interested in the result of this suit. I don't think Monroe produced Exhibit L; think Mason did; and think Mason read from his letter-book the letter he had written Buchtel on the 13th Jan'y. Mason did not give the short paper Exhibit L, and the letter of the 13th was shown the 1st thing after we got into the office; they were the first papers shown. There was another paper produced by Mason. Monroe made me a copy of the contract assigning 2d grade of logs; hav'n't it with me. I am sure it was Monroe that was there and made the copy. I don't think it was a copy of Exhibit L I took.

THOMAS MONROE, recalled for def't:

I have heard the testimony of Crouse and Buchtel as to this interview on the 15th day Jan'y. I was in the room about all the time. Buchtel and Crouse came there and wanted some money on the 1st payment of contract A, due Jan'y 1st. Mason told him there was no money coming at that time; that he had been making payments for the Big Rapids Imp. & M'n'f'g Co.. and that there was nothing due at that time.

Then Crouse said they could use short paper. Mason said he
164 could not give any paper. Then Buchtel spoke of going to Big
Rapids. The Eldred contract came up, and, it was understood, was a part of the conversation, that Buchtel was to go to Big Rapids and have the Eldred contract assigned to him as security, and get any other security he could for the payment due on contract A. I don't remember making any writing for them on that occasion. The copying that was done for them was by the bookkeeper. I produced Exhibit L for them at Mason's request. Mason did not promise to make any payments; he showed the letter of Jan'y 13th. The Mason Lumber Co. refused to make any payments either in cash or giving paper.

Cross-examined:

I should think the interview lasted one hour. It was in the forenoon. I was present pretty much all the time. Principal reason Mason gave for not paying was, we had made payment to the Big Rapids Imp. Co.; did not hear Mason tell Buchtel that he had tried to get an assignment of the Eldred contract.

J. W. CROUSE recalled:

(Plat-book that Eldred's attention was called to shown witness.)
165 I know Elisha Eldred. I presented this identical book to Mr.
Eldred in my office. and he took out his memorandum book and copied his description, as he called it, and the estimates from this book into his memorandum book on or about Sept. 26, 1874.

The said issues was then submitted to the said referee, and he found the said plaintiff was entitled to recover of the said defendant the sum of $3,068.40, with interest thereon from the 23d of Sept., 1874, at 10%, and because none of the same exceptions so offered and made to the opinions and decision of the said referee do appear upon the record of said trial.

Therefore, at the request of said defendants, by their said counsel, the said referee hath signed this bill of exceptions, according to the statute in such case made and provided, this 25th day of May, A. D. 1876.

J. W. RANSOM,
Referee.

166 UNITED STATES OF AMERICA:

Circuit court of the United States for the sixth circuit and western district of Michigan.

WILLIAM BUCHTEL
vs.
THE MASON LUMBER COMPANY.

To the circuit court of the United States for the 6th circuit and western district of Michigan:

In pursuance of an order of this court made in the above-entitled cause, on the 8th day of November, A. D. 1875, by which the same was referred to me as referee therein for trial, I hereby certify and report that on the 7th day of December, A. D. 1875, the parties hereto appeared before me, said plaintiff, by Messrs. Taggart, Simonds & Fletcher, and the said defendant by Messrs. Smith, Nims & Erwin, their attorneys of record therein, and said cause proceeded to trial.

That the testimony of the respective parties thereto, and that of the witnesses produced by them, was taken before me under oath from time to time until the 15th day of December, A. D. 1875, when each party announced to me that they had no further proofs to offer therein.

167 That after hearing the proofs and allegations of the parties and the arguments of counsel, I have found the facts proven in said cause, and the whole thereof, and the law thereon, which said findings of fact and law are hereto subjoined, and are as follows:

UNITED STATES OF AMERICA:

Circuit court of the United States for the 6th circuit and western district of Michigan

WILLIAM BUCHTEL
vs.
THE MASON LUMBER COMPANY.

I find the following as the facts proven in this case:

1st. The plaintiff, at the time of the commencement of this suit, and at the time the several transactions occurred between the plaintiff and the defendant, constituting the cause of action herein, was a citizen of the State of Ohio, and a resident of the city of Akron, in said State.

2d. The defendant, at the time aforesaid, was a manufacturing corporation, organized, existing, and doing business as such under the laws of the State of Michigan, having its office and conducting its business
168 at the city of Muskegon, within the western district of Michigan; that at such times Lyman G. Mason was the president of said corporations and Thomas Monroe was the secretary thereof.

3d. That at the time aforesaid The Big Rapids Improvement and Manufacturing Company was a corporation organized, existing, and doing business as such under the laws of the State of Michigan, with a business office located at Big Rapids, within the western district of said State, and that Stephen Bronson was the vice-president thereof.

4th. That the plaintiff made a contract with said Big Rapids Improvement and Manufacturing Company for the sale by the plaintiff to said last-named corporation of certain lands lying in the county of Missaukee, in the State of Michigan, described as follows:

The northeast quarter and the north half of the northwest quarter of section 18; also the southeast quarter and the northeast quarter of the southwest quarter of section 8; also the west half of the southwest quarter, and the west half of the northwest quarter, and the southeast quarter of the northwest quarter, and southwest quarter of the
169 northeast quarter of section 24; all in township 21 north, of range 7 west, containing six hundred and eighty-one and $\frac{88}{100}$ acres of land, according to the United States survey.

That said last-named corporation agreed to pay plaintiff for said land the sum of twelve thousand two hundred and seventy-three and $\frac{84}{100}$ dollars, as follows: Three thousand and sixty-eight and $\frac{46}{100}$ dollars on the 1st day of January, A. D. 1875, with interest thereon at ten per cent.,

and the balance in three equal annual payments, the first annual payment to be made on the 23d day of September, A. D. 1875, with interest from the date of said contract, to be paid on the 23d day of September in each year on the whole sum remaining unpaid in each year at the rate of seven per cent. The date of which said contract was and is the 23d day of September, A. D. 1874, and the principal and interest therein is payable at "The Citizens' Savings and Loan Association," at Akron, Ohio.

That Stephen Bronson, vice-president of said last-named corporation, conducted the negotiations which resulted in said contract on behalf of said corporation, and together with Finley D. Brown; the secretary thereof, executed the same on its behalf.

170 5th. That said contract contained the following provisions: "No timber is to be cut or removed from said lands without the written permission of the first party endorsed on this contract"; and that the plaintiff herein was the party of the first part in said contract named and that said last-named corporation was the party of the second part thereto.

6th. That said contract was drawn up at the city of East Saginaw, in said State of Michigan, on the day of the date thereof, but was not executed by the parties thereto until the 24th day of September, A. D. 1874, when it was executed in duplicate at the drug store of one Brown, at the city of Big Rapids, in said State, one of which said duplicates was then retained by said plaintiff, and the other was delivered to said Bronson.

7th. That at the time of the execution of said contract said last-named corporation, through its vice-president and secretary (Stephen Bronson and Finley D. Brown), also executed and delivered to said plaintiff a mortgage for the sum of ($14,750$\frac{10}{100}$) dollars on lands situate in township 21 north, of range 8 west, in said State of Michigan, to secure the said plaintiff the payment of the purchase price thereof, which said 171 lands had been sold by said plaintiff to said last-named corporation some time before that time, which said mortgage is hereto annexed and made a part of my finding of facts in this case, and is marked Exhibit G.

8th. That prior to the execution of said contract and on the 17th day of September, A. D. 1874, said Big Rapids Improvement and Manufacturing Company entered into a written contract with said Mason Lumber Company to cut and deliver to said Mason Lumber Company (defendant in this suit) 4,000,000 feet of 1st class of white pine saw logs from the lands covered by said contract and first herein described and from the lands covered by said mortgage, which said contract for the delivery of said logs was in force between said corporations on said 24th day of September, 1874, and is hereto annexed, marked Exhibit D, and is made a part of my finding of facts herein.

9th. That before the executing and delivery by said plaintiff of the contract for the sale of said lands to said Big Rapids Improvement and Manufacturing Company, said Stephen Bronson, on behalf of said last-named company, refused at first to execute the same by reason of 172 the provision therein prohibiting said corporation from cutting timber upon said lands without the written permission of said plaintiff endorsed on said contract.

This refusal was at Saginaw, and afterwards at Big Rapids. But afterwards, having received a letter from Muskegon, said Bronson stated to plaintiff that he had a contract for the delivery of a quantity of logs to said Mason Lumber Company, and would sign the contract as it was,

and asked said plaintiff to go with him to Muskegon and see if some arrangemnet could not be made to secure plaintiff, so that plaintiff would permit said lands to be cut. That accordingly said contract was executed and delivered as hereinbefore found, and said plaintiff and said Stephen Brohson afterwards, and in the afternoon of said 24th day of September, 1874. went from Big Rapids to Muskegon together to see if the said Big Rapids Improvement and Manufacturing Company could make some arrangement with said Mason Lumber Company whereby said plaintiff might be secured in the payment of the purchase price of said lands and be induced to permit the timber to be cut therefrom. The lands herein
last above referred to being the same lands described in para-
173 graph 4 of these findings, and the contract referred to in said
paragraph is now and hereinafter described as contract A, and
is hereunto attached marked Exhibit A and made a part of my findings of fact in this case.

10th. That on the morning of the 25th day of September, A. D. 1874, said Stephen Bronson met Lyman G. Mason, of Muskegon, president of said Mason Lumber Company, at the Occidental Hotel in said Muskegon, introduced said plaintiff to said Mason, made said Mason acquainted with their business there, had a conversation with him, and made an appointment to meet him, said Mason, at said Mason Lumber Company's office that morning. That between 9 and 10 o'clock a. m. of that day the plaintiff and said Bronson went to the office of said Mason Lumber Company, and that such negotiations were then and there had between said Bronson, on behalf of said Big Rapids Improvement and Manufacturing Company, said Lyman G. Mason, on behalf of said Mason Lumber Company, and said plaintiff on his own behalf, as resulted in assignment of said contract A by Big Rapids Improvement and Manufacturing Company to said Mason Lumber Company the guaranty by
said Mason Lumber Company of the payment to plaintiff
174 of the several sums of money agreed to be paid to him by the
provisions of said contract A, and in permission on the part of
said plaintiff to cut the timber from the lands described in said contract by the execution by said corporations and said plaintiff of Exhibit B, which is hereto attached and is hereby made a part of my findings of the facts in the case.

11th. That during such negotiations the said Stephen Bronson produced a plat of the township in which said lands described in contract A is situated, which said lands were represented by yellow and red colors on said plat, upon or near to which said colors are the figures 1,700, 1,800, 1,000, and 1,200; that said Bronson represented said lands to contain 5,700,000 feet of pine timber, but I do not find that said plaintiff made any representations whatever in relation to the quantity of timber on said lands, or that he had any knowledge of the quantity of timber thereon at the time of the execution of Exhibit B. I find that at that time said plaintiff had never seen said lands, and that said Mason Lumber Company was aware of that fact by a communication then
made of that fact by said plaintiff to its said president; that all the
175 knowledge which said plaintiff had of the quantity of timber on
said lands at the time of the execution of said Exhibit B was an
estimate furnished him by his grantor (one Bently) at the time said plaintiff purchased said lands, which said estimate was 3,900,000 feet, but I do not find that said estimate was before him at that time, or that he made any representations in relation thereto; that during such negotiations said plat was on the table in the presence of said Lyman G. Mason (president of said Mason Lumber Company), and in presence

of the plaintiff and said Bronson, and was examined by said Mason, but I do not find that the plaintiff's attention was called to the same by either Mason or Bronson, or that plaintiff made any statements or representations to any of the parties present in relation thereto, or the figures upon it, or to the quantity of timber these represented to be on said lands.

I do find that the plat so produced by said Bronson at said negotiations was a plat delivered to one Miller by said plaintiff, about one year and a half before that time, and that it has not been in plaintiff's possession since such delivery; that at the time of said delivery the esti-
mates of said Bentley before referred to were marked on said
176 lands on said plat; that said plaintiff never changed the same,
or authorized any change thereof, and had not before seen said
plat since its delivery to Miller.

I do not find that Miller was the agent of said plaintiff for any purpose whatever, neither do I find that the representations of Bronson to said Mason relative to the quantity of timber on said lands were made in the hearing of said plaintiff. I do find, however, that at or about the time of the execution of said Exhibit B, said Mason remarked to said plaintiff substantially that if the timber was there (meaning on the lands) it was all right, and the Big Rapids Improvement and Manufacturing Company had a good thing, to which said plaintiff replied that, judging from Eldred & Bronson's anxiety to get the lands, it must be all right, but that he had never seen said lands. Said plat referred to in this paragraph is hereto annexed, marked Exhibit C, and is hereby made a part of my findings of fact.

12th. That after the terms of Exhibit B had been settled and agreed upon, and about the time of the delivery thereof, there was an inter-
view between said Lyman G. Mason and said plaintiff alone, con-
177 cerning the cutting of pine on the lands in township 21 north, of
range 8 west, covered by said mortgage (Exhibit G), at which
interview said plaintiff informed said Mason of the fact that he (plaintiff) had a mortgage on these lands, and that after the interview a contract was executed by said Mason Lumber Company to said plaintiff, by which said last-named company agreed to pay the plaintiff $2.50 M on account of said mortgage, and to be applied thereon for all timber it should take from said lands, which said contract was assented to by said Big Rapids Improvement and Manufacturing Company, and executed by said Stephen Bronson in its behalf, and is hereto annexed and made a part of my findings of fact, and is marked Exhibit F.

And I also find that the execution of said Exhibit F was the result of information obtained after his arrival at Muskegon and at the Mason Lumber Company's office, on the morning of said 25th day of September, 1874, relative to the existence of the contract D, hereinbefore referred to. I also find that said Exhibit F has no connection with Ex-
hibits A and B, and formed no inducement thereto.

178 13th. That said Mason Lumber Company received under their
said contract (Exhibit D) from the lands covered by said con-
tract A only 1,162,543 feet, leaving standing thereon 74,656 feet, and making in all 1,237,199 feet of merchantable timber thereon; that there was upon said contract A lands a large amount of timber at the time of the execution of said Exhibit B which was rendered unmerchantable by reason of rot, shakes, being hollow, and other defects, amounting by estimates of witnesses of from ten to twenty-five per cent. of the whole amount, many of which defects could not be discovered until the timber was cut; that prior to the execution of said contracts A, B,

and D, and about the 5th day of September, 1874, said Mason Lumber Company had knowledge of the quality of timber on so much of said contract A lands as are situated upon sections 8 and 18 in said township 21-7, but that it had no knowledge of the quantity of timber thereon, or the quantity or quality on section 24 covered by said contract A, except what it derived from said Bronson and said plat C.

14th. That at the time of the commencement of this suit there
179 was due from said Big Rapids Improvement and Manufacturing
Company to said plaintiff, and unpaid in said contract A, the sum of $3,068.46, and interest thereon at ten per cent. from the 23d day of September, 1874, which said sum of money became due on the first day of January, 1875.

That said Mason Lumber Company had notice of the non-payment of said sum of money by said Big Rapids Improvement and Manufacturing Company after it became due and on or before the 13th day of January, 1875, and was requested by said plaintiff to pay the same, which said Mason Lumber Company neglected to do, and produced to such plaintiff authority from said Big Rapids Improvement and Manufacturing Company to said Mason Lumber Company to pay the same in monthly payments, as follows:

$1,000, February 10th, 1875; $1,000, March 10th, 1875; $500, April 10th, 1875, and on May 10th, 1875, sufficient to pay the balance with interest from moneys coming to said Big Rapids Improvement and Manufacturing Company from said Mason Lumber Company at those times; that payments were made by said Mason Lumber Company on
account of said log contract D, after receiving notice of non-pay-
180 ment of plaintiff's demand, amounting to the sum of $6,000.00.

Findings of law.

Upon the foregoing facts found, I find the following as the law of the case:

1st. To enable the plaintiff to recover in this action he must show an indebtedness due and unpaid by the Big Rapids Improvement and Manufacturing Company to the plaintiff at the time this suit was brought, and that said defendant had become liable therefor, substantially in the manner and form as alleged in the declaration in this cause.

2nd. The defendant, if liable, is so by the terms of the contract, Exhibit B, and such notice thereunder of non-payment by the Big Rapids Improvement and Manufacturing Company as is required by law in such cases.

3rd. By Exhibit B the Big Rapids Improvement and Manufac-
181 turing Company assigned its interest in contract A to the defend-
ant in consideration of the guaranty therein contained; the plaintiff assented to that assignment and gave permission generally to cut the timber on the land described by contract A.

It is claimed by defendant that the legal effect of Exhibit B, so far as its liability is concerned, is to postpone the payments provided for in contract A until the 23d of September, 1875; that is, by the terms of said guaranty it agreed to commence paying on the 23d day of September, A. D. 1875, so much as might be then due and unpaid by the Big Rapids Improvement and Manufacturing Company for so much of the land described in said contract A from which the timber had been cut and removed at said date, and consequently that no cause of action existed against it on said guaranty on the 12th day of April, A. D. 1875, the time when this suit was commenced.

Will Exhibit B bear that construction? Let me see:

By the terms of said paper "the Big Rapids Improvement and Manufacturing Company hereby assigns the contract (A) hereto attached, of date September 23rd, 1874, between William Buchtel, of Akron, Ohio, and said Big Rapids Improvement and Manufacturing Company, the said Buchtel hereby assenting to this assignment, with the under-
182 standing that said Mason Lumber Company hereby guarantees
the payments as stipulated in said contract, upon which guarantee permission is hereby given to enter upon and cut and remove the timber upon the lands described in said contract hereto attached, it being understood and agreed that as fast as the timber is cut and removed from said land or any part thereof the purchase price shall be due and payable; that is to say, for all of said land which may be cut before the 23rd day of September, 1875, the full purchase price shall be paid on that date." $\$3,068\frac{46}{100}$ became due on contract A January 1st, 1875, by its terms.

By its term a like payment became due on the 23rd day of September, 1875, on the 23rd day of September, 1876, and on the 23rd day of September, 1877.

We assent to the rules of construction contained in defendant's request to find:

"The instrument must speak the intention of the parties at the time it was made."

"Regard must be had to the object and whole scope of the instrument."

"The construction must be made upon the entire instrument, and not merely upon disjointed parts of it."

183 "General words in an agreement will be qualified by a subsequent special promise, unless full effect can be given to the instrument without altering or modifying either."

Applying these rules of construction to Exhibit B, was the payment provided in contract A to be paid on the 1st day of January, 1875, postponed? By the terms of Exhibit B it will not be claimed that either the Big Rapids Improvement and Manufacturing Company or the defendant were obliged to cut any timber on said lands prior to the 23rd day of September, 1875, or at any other time. Then, to what time was the January, 1875, payment postponed, if postponed at all?

Suppose neither of the corporations had cut any timber on said lands prior to the 23rd of September, 1875; when, by a proper rule of construction, was the payment due at that time by the terms of contract A payable under the provisions of contract B?

I think the defendant fails in the application of these rules to the construction he claims the defendant by executing the instrument "guarantees the payments as stipulated in said contract."

The legal import of this expression is that said Big Rapids
184 Improvement and Manufacturing Company shall pay the instal-
ments of purchase money provided in contract A as they become due by the terms of that contract.

Effect must be given to this provision of the guaranty, if possible, without destroying other portions of the instrument.

Subsequently a provision is found in the instrument which contemplates the cutting of timber upon the lands described in A prior to the 23rd day of September, A. D. 1875. Possibly it may all be cut before that time, but the guarantor has its option in relation to that. If it chooses to cut the timber or permit it to be cut before that time, in that case the plaintiff's payments are advanced upon his contract by so much in amount as the whole purchase price bears to the quantity of land cut. If the whole is cut, then the plaintiff, on the 23rd day of September, 1875, would have his right of action upon his guaranty for the whole purchase price remaining unpaid in case said Big Rapids Improvement and Manufacturing Company should fail to pay the same.

This construction supports every provision of the paper and makes the two provisions consistent with each other. I find, therefore, that
said sum of $\$3,068\frac{46}{100}$, payable by contract A on the 1st day of
185 January, 1875, was due said plaintiff at the time of the com-
mencement of this suit as against said defendant, if said defend-
ant is otherwise liable.

4th. I find, as a matter of law under the foregoing facts found in this case, that defendant had reasonable notice of non-payment by Big Rapids Improvement and Manufacturing Company of *of* the installment due January 1st, 1875, for the recovery of which this suit is brought.

The notice of non-payment was given to defendants as soon as the 13th of January, 1875.

What the notice should be or when it should be given is not settled in the case of a guarantor as it is in the case of an endorser; but the reason and justice are the same in both cases and equally require notice, in order that the guarantor may at once take what measures are within his power to secure or indemnify himself.

"The question of reasonable time is a question of law, and the cases are very few which would help us in determining what time would be reasonable. But from the authorities and the reason of the thing we deduce
these rules."

186 "The grantor is entitled to this notice, but cannot defend
himself by the want of it unless the notice and demand have been
so long delayed as to raise the presumption of waiver or of payment, or unless he can show that he has lost by the delay opportunities for obtaining securities which a notice or an earlier notice would have given him." (Parsons on Contracts, 2nd vol., pages 28 and 29.)

No testimony was offered in this case for the purpose of showing that defendant had lost anything or had been in anywise injured for want of an earlier notice or a reasonable demand. The burthen of proof is upon the defendant to show these facts in order successfully to escape responsibility on his guaranty for want of seasonable notice. In Allen vs. Rightman (20 John's R., p. 366,) it is determined that an unconditional guarantor of payment is charged as such without any notice whatever. The doctrine above quoted from Parsons on Contracts is substantially endorsed in Lawrence vs. McCalmert (2 Howard, 186,) and in Reynolds vs. Douglass (12 Peters, 496). I therefore find as a matter of law that the notice of nonpayment received by defendant was sufficient to charge it as a guarantor in this case, and that it is not discharged for want
thereof.

187 5th. It is insisted on behalf of said defendant that there can
be no recovery against it in this case by reason of a variance be-
tween the declaration and the proofs at the trial, in this, that the plaintiff counts on a guaranty to pay according to the tenor and the effect of the contract guaranteed, whereas the proof is of a guaranty to pay in a manner different from the provisions of the contract. The contract of guaranty, Exhibit B, is not set up "in hic verba" in the declaration, but is declared upon according to its legal tenor and effect. The object of the suit as determined from the declaration is to recover the payment on the contract A due by its terms on the first day of January, 1875.

By my construction of the contract of guaranty (Exhibit B) in paragraph 3 of these findings of law, I have determined that the legal tenor and effect of said contract was to guarantee that the payment due by the terms of contract A, January 1st, 1875, should be paid the plaintiff at that time. It was competent for the plaintiff to declare upon that instrument according to its legal tenor and effect, and in my judgment the proofs support the declaration in that particular, and that there is no such variance as will prevent recovery.

188 6th. The defence in this case on the merits is that the defendant entered into the contract of guaranty upon which plaintiff seeks to recover upon the representations, undertakings, and promises of said plaintiff made at the time said contract was entered into and as an inducement thereto, that said lands mentioned in the declaration in this case and described in said contract A then contained and would yield five millions seven hundred thousand feet board measure of good, merchantable pine timber. That said defendant confided in these representations, undertakings, and promises of said plaintiff, and in reliance thereon took an assignment of said contract A from said Big Rapids Improvement and Manufacturing Company and guaranteed the payments therein contained to said plaintiff. It is claimed by the defendant that these representations were false and fraudulent and that the defendant has suffered great damage in consequence thereof.

A very large amount of testimony has been taken to establish this de-
fense on the one side and to controvert it on the other. By my finding
of facts it appears that said land did not at that time contain
189 5,700,000 feet of merchantable pine, but contained less than one-
fourth of that quantity.

But I do not find that said plaintiff had any actual knowledge of the quantity of pine on said lands at that time, or that he had ever had any knowledge of the quantity thereon, except an estimate of the same made by one Bentley for his grantor furnished him at the time he purchased said lands several years before, which estimate placed the amount at 3,700,000 feet. I do not find that said plaintiff made any representations at the time said contract of guaranty was entered into or at any other time as an inducement thereto, or for any other purpose, to said defendant relating to the quantity of pine on said lands. He entered into the contract A for the sale of the lands without any warranty as to the quantity or quality of timber thereon. No question is raised of that kind; no mention is made of the quantity of pine on the lands in the written agreement containing the guaranty. I have found as a fact, however,
that Bronson, vice president of the Big Rapids Improvement and Manu-
facturing Company, produced plat C, and that the same was ex-
190 amined by the president of defendant during the negotiations
out of which said guaranty and assignment grew, and that it lay
on the table in the presence of said Bronson, Mason (president of defendant) and plaintiff, but that plaintiff's attention was not called to said plat or the figures thereon. I have also found as a fact that after the terms of said assignment and contract of guaranty had been agreed upon and settled, and about the time of the execution thereof, said Mason, president of said defendant, remarked to said plaintiff, "If the timber is there it is all right, and the Big Rapids Improvement and Manufacturing Company has a good thing," and that said plaintiff replied, "Judging from the anxiety of Bronson and Eldred to purchase it, I suppose it is all right. I have never see these lands." Is this such a false representation or a false suppression of facts within the knowledge of plaintiff as will avoid the guaranty on the ground of fraud?

Plat C was a plat which had belonged to said plaintiff, it is true, one

year and half before that time; at that time he had parted with the possession of it and had not seen it since. When it went into the
191 possession of Miller, at that time it had on it the estimates of Bentley of the quantity of pine on said land, viz, 3,700,000 feet. Plaintiff had made the estimates himself on it and he had no knowledge upon which to base an estimate. If the plaintiff knew during said negotiations that plat C then contained an estimate of 5,700,000 feet of pine on said lands and defendant was making a contract on such basis, what does it matter unless he had within his own breast knowledge at that time that it contained a far less quantity?

There is nothing in the case which shows that plaintiff had any such knowledge. The estimate of quantity which Bentley had given him may not have been in his mind at that time. But if it was, was he under any legal or moral obligation to communicate to defendant unasked the opinion of Bentley in relation to quantity?

The reply of plaintiff to the remark of the president of defendant, that he thought it was a good thing judging from the anxiety of Eldred and Bronson to purchase the lands indicated to the president, it seems to me that the plaintiff was not then acting upon any knowledge he had
192 himself of the amount of timber thereon. I am of the opinion, therefore, under the facts found in this case, that there was no misrepresentation or suppression of facts known to said plaintiff relative to the quantity of timber on said lands made by said plaintiff which amounted to a legal fraud upon said defendant in the premises and avoided said assignment and guaranty.

As a matter of law upon the whole case upon the foregoing facts found, I find that the said plaintiff, William Buchtel, is entitled to judgment therein against said defendant, the Mason Lumber Company, for the sum of three thousand and sixty-eight dollars and forty-six cents, with interest thereon at ten per cent. from the 23rd day of September, A. D. 1874, and I hereby render judgment in favor of said plaintiff and against said defendant accordingly.

And I further certify and report that, on the 31st day of March, 1876, I notified the attorneys of the respective parties that I would complete this my report on the 6th day of April, 1876, at 10 o'clock a. m. of that day, at my office, in the city of Grand Rapids, in said district.

193 That, at the time and place last aforesaid, the parties again appeared before me by their respective attorneys, and such proceedings were then and thereafter had upon the stipulation of the respective parties through their said attorneys, that, on the 25th day of May, 1876, at 10 o'clock a. m. of that day, the respective parties, by their attorneys, again appeared before me, and said defendant presented a bill of exceptions to the proceedings on said trial; which said bill of exceptions (after amendments thereto proposed by said plaintiff) was settled and signed by me at the request of said defendant, and is hereto attached and made a part of my report.

That, at the same time and place, the said defendant, by its attorneys, requested me to find as matter of law as follows:

"Under all the testimony in this case I find, as matter of law, that the plaintiff is not entitled to recover, and defendant is entitled to a judgment of no cause of action.

"There is no evidence tending to maintain a cause of action against the defendant.

194 "As there is no testimony in the case showing that the defendant corporation had ever authorized Lyman G. Mason after the

execution of Exhibit B, and had ever ratified any such promise, if any was made, therefore such promise could not be binding on defendant."

Which said several requests to find as aforesaid were each and every of them then and there refused by me. To which said refusal the said defendant, by his counsel, did then and there except.

And I further certify and report that I have spent eighty-four hours in the trial, argument, and consideration of said cause, making fourteen days of six hours each, and that my fees therefor amount to the sum of $140.00.

Dated June 26, 1876.

J. W. RANSOM,
Referee.

$125.00.]

Received of Taggart, Simonds and Fletcher, att'ys for pl'ff, one hundred and twenty-five dollars, to apply on my fees.

June 19th, 1876.

J. W. RANSOM,
Referee.

195 This contract, made the 23rd day of September, in the year one thousand eight hundred and seventy-four, between William Buchtel, of Akron, Ohio, party of the first part, and the Big Rapids Improvement and Manufacturing Company, of Big Rapids, Mich., party of the second part, witnesseth as follows, to wit:

I. The party of the first part, for himself, heirs, executors and administrators, agrees to sell to the said party of the second part all those certain pieces or parcels of land situate, lying, and being in the county of Missaukee, in the State of Michigan, which are known and described as follows, to wit:

The northeast quarter and the north half of the northwest quarter of section eighteen (18); also the southeast quarter and the northeast quarter of the southwest quarter of section eight (8); also the west half of the southwest quarter, and the west half of the northwest quarter, and the southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of section twenty-four (24), all in township twenty-one (21) north, of range seven (7) west, containing six hundred and eighty-one and $\frac{88}{100}$ acres, according to United States survey, be the same more or less.

196 II. The said party of the second part, for itself and successors and assigns, agrees to pay to the said party of the first part for the said lands the sum of twelve thousand two hundred and seventy-three and $\frac{84}{100}$ dollars, as follows: Three thousand and sixty-eight $\frac{46}{100}$ dollars on the first day of January next, with interest thereon at ten per cent., and the balance in three equal annual payments; the first annual payment to be made on the 23rd day of September, A. D. 1875, with interest from the date thereof, to be paid on the 23rd day of September in each year on the whole sum remaining due or unpaid in each year, at the rate of 7 per centum, and the said party of the second part shall also pay and discharge all taxes and assessments, of whatever name or character, imposed on said premises or upon this contract from and after the 23rd day of September, A. D. 1874, whether ordinary, extraordinary, or for revenue purposes; both said principal and interest payable at the Citizens' Savings and Loan Association, in Akron, Ohio.

III. Forthwith after the full payment of said purchase-money, taxes, and interest as aforesaid, the party of the first part agrees to ex-

197 ecute, or cause to be executed, to the party of the second part a
good and sufficient warranty-deed for the said lands, so as to
convey the same in fee-simple free from encumbrances to said party of
the second part; subject, however, to all taxes, assessments, and liens
or titles thereunder accrued or levied after the date hereof, and subject
also to all liens or transfers made by the party of the second part, its
successor or assigns.

IV. In case default shall be made by the party of the second part, its successors or assigns, in any of the conditions above stipulated to be performed by it, it shall and may be lawful for the party of the first part, if he see fit, to declare this contract void, and to re-enter upon the said premises at any time after such default without serving on the party of the second part, or other person holding under it, a notice to quit said land.

And in case this contract shall be so declared void, the party of the
second part shall thenceforth be deemed a mere tenant under the said
party of the first part, and be liable to be proceeded against without
notice to quit, under the provisions of an act regulating proceed-
198 ings in case of forcible entry and detainer, and the acts amend-
ing the same; and the party of the first part, in such case, shall
be at liberty to sell the said land to any person or persons whomsoever
without being liable in law or equity to the party of the second part, or
any person claiming under it, for any damages in consequence of such
sale or to return any payments made on account of this contract; and
payments that shall have been made may be held by the party of the
first part as stipulated damages for the non-performance of this con-
tract, and said first party shall have a right to recover all damages
sustained by reason of the holding over of said second party without
permission.

And it is hereby expressly understood, declared, and agreed by and
between the parties hereto that time is and shall be deemed and taken
as the very essence of this contract, and all courts shall so construe the
same; and that unless the same shall in all respects be complied with by
the said party of the second part at the respective times and in the
manner herein specified and declared, said party of the second part shall
lose and be debarred from all rights, remedies, or actions, either
199 in law or equity, upon or under this contract, and no waiver of
time or manner of performance shall be implied or alleged to ex-
cuse a failure, unless such waiver shall be in writing and signed by the
party of the first part or his agent lawfully authorized.

No timber is to be cut or removed from said lands without the written permission of first party endorsed on this contract.

It is also expressly agreed that, as often as any proceedings shall be taken by said party of the first part, either at law or in equity, to cancel this contract or regain possession of said premises, said party of the second part shall pay to said party of the first part the sum of one hundred dollars, as a reasonable attorney's or solicitor's fee, in addition to all other legal costs, whether such proceedings shall terminate in the recovery of the possession of said premises by said first party or the cancellation of this contract, or be sooner stayed by payment or otherwise.

And it is further expressly agreed that in case default shall be made
by the party of the second part in any of the conditions stipulated to be
performed by it, and the party of the first part shall see fit to de-
200 clare this contract void, such declaration may be made by a brief
notice thereof addressed to the party of the second part, at Big
Rapids, Mich., and deposited in the post office in Akron, Ohio, with

legal postage prepaid, and this shall constitute a good and sufficient notice and service thereof.

In witness whereof the parties have hereunto set their hands and seals the day and year first above written. Second party executes by its vice president, Stephen Bronson, and its secretary, Finley D. Brown, who by its articles of association, are authorized to execute such instruments.

WILLIAM BUCHTEL. [L. S.]
BIG RAPIDS IMP. & M'F'G CO. [L. S.]
STEPHEN BRONSON, *V. Pres't*,

In presence of—
C. H. MILLER.
C. A. STICKNEY.

Attest:
F. D. BROWN, *Sec'y*.

Exhibit A of pl'ff's proofs. J. W. Ransom, referee.

201 *Exhibit B of pl'ff's proofs.—J. W. Ransom, referee.*

MUSKEGON, MICH., *Sept. 25th*, 1874.

In consideration of the sum of one dollar, the receipt of which is hereby acknowledged by the Big Rapids Imp. & Man'f'g Co., and for other valuable considerations, the Big Rapids Imp. & Man'f'g Co. hereby assigns the contract hereto attached of date Sept. 23d, 1874, between William Buchtel, of Akron, Ohio, and said Big Rapids Imp. & M'f'g Co.; the said Buchtel hereby assenting to this assignment, with the understanding that said Mason Lumber Co. hereby guarantees the payments as stipulated in said contract, upon which guarantee permission is hereby given to enter upon, cut, and remove the timber upon the lands described in said contract hereto attached, it being understood and agreed that as fast as the timber is cut and removed from said land, or any part thereof, the purchase price shall be due and payable; that is to say, for all of said land which may be cut before the 23d day of September, 1875, the full purchase price shall be paid on that date.

BIG RAPIDS IMP. & M'F'G CO.
S. BRONSON, *V. Pres't*.
WILLIAM BUCHTEL.
[MASON LUMBER COMPANY SEAL.] MASON LUMBER CO.
THOMAS MUNROE, *Sec'y*.

202 This indenture, made this twenty-third day of September, in the year of our Lord one thousand eight hundred and seventy-four, between the Big Rapids Improvement and Manufacturing Company of Big Rapids, Mecosta Co., Mich., of the first part, and William Buchtell, of Akron, Ohio, of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of fourteen thousand seven hundred and fifty dollars and ten cents to it in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold, remised, released, enfeoffed, and confirmed, and by these presents does grant, bargain, sell, remise, release, enfeoff, and confirm unto the said part' of the second part, and to his heirs and assigns, forever, all of the following described lands, situated in the county of Missaukee, in the State of Michigan, to wit: The N. fr'c. ½ of the N. E. ¼, and S. E. ¼ of N. E. ¼; N. E. frac. ¼ of N. W. frac. ¼ of sec. 2, town. 21 N., range 8

west; and N. ½ of S. E. ¼, and S. E. ¼ of S. E. ¼, of sec. 4, town. 21
203 N., range 8 west; and S. W. ¼ and S. ½ of S. E. ¼, and N. E. ¼ of S.
E. ¼ of sec. 16, town. 21 N., range 8 west; and S. ½ of N. W. ¼, and N. W. ¼ of N. W. ¼, and N. ½ of S. E. ¼, and S. W. ¼ of S. E. ¼ of sec. 22, town. 21 N., range 8 west, according to U. S. survey containing 819$\frac{45}{100}$ acres, be the same more or less, together with the hereditaments and appurtenances thereunto belonging or in anywise appertaining.

To have and to hold the above bargained premises unto the said party of the second part, and to his heirs assigns, to the sole and only proper use, benefit, and behoof of the said party of the second part, his heirs and assigns, forever; and the said party of the first part, for itself and for its successors, does covenant, grant, bargain, and agree to and with the said party of the second part, heirs and assigns, that at the time of the unsealing and delivery of these presents it is well seized of said premises in fee simple; that they are free from all encumbrances and charges whatever; and that it will, and its successors and assigns shall forever, warrant and defend the same against all lawful claims whatsoever,
204 except a trust deed and log contract hereinafter mentioned: Pro-
vided always, and these presents are upon the express condition, that if the said party of the first part shall and do well and truly pay, or cause to paid, to the said party of the second part the sum of fourteen thousand seven hundred and fifty and $\frac{10}{100}$ dollars, and interest thereon as follows, to wit, $3,687.52, and interest thereon at ten per cent. from July 29th last, on the first day of January, 1875, and the balance in three equal annual payments, with annual interest, on the 29th day of July, 1875, 1876, and 1877, according to four promissory notes bearing date July 29th, 1874, executed by first party to said party of the second part, and endorsed by Stephen Bronson, to which these presents are collateral, and shall also pay, or cause to be paid, all taxes and assessments of whatever nature now or which may be levied upon said premises above described, as soon and as often as the same may become due and payable.

And the said first party does hereby covenant and promise to and with said second party, his representatives and assigns, that it, the said first party will pay to said second party, the full sum of $14,750.00 dollars with interest as above provided.

205 This mortgage is subject to a log contract between the first
party hereto and Elisha Eldred & Co., of Chicago, by which said first party agrees to sell said Eldred & Co. 2,500,000 feet of pine logs to be cut from the aforesaid lands during next winter and spring; and subject to a trust deed of said lands to said Eldred & Co., to secure them for $3,000 advances made, and $7,000, hereafter to be made by them to first party hereto on said log contract; and first party hereto hereby sells' assign and mortgages to second party hereto the payment of $2,500, due on said log contract from Eldred & Co., to first party hereto on the first day of July next, and so much of the $2,500 due it thereon on the 1st of August next as will equal and pay the payment and annual interest due on this mortgage on the 29th day of July next; and it is made a further covenant and condition of this mortgage that if first party hereto shall at any time fail to perform said log contract with Eldred & Co., second party may on such failure perform the same and receive all moneys then due or to grow due thereon and out of the same retain the costs and expenses of such performance and the balance apply on this mortgage debt;

206 And shall further keep and perform all covenants and agree-

ments hereinafter made, then these presents and said notes shall cease and be null and void.

And it is hereby expressly agreed that should any default be made in payment of the said sum, interest, taxes, assessments, or any part thereof, on any day whereon the same is made payable as above expressed, and should the same remain unpaid and in arrears for the space of twenty days, then and from thenceforth, that is to say, after the lapse of the said twenty days, the aforesaid principal sum of fourteen thousand seven hundred and fifty and $\frac{10}{100}$ dollars, with all arrearage of interest thereon and all taxes, assessments unpaid, shall, at the option of said obligee, his executors, administrators or assigns, become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired, anything thereinbefore contained to the contrary thereof in anywise notwithstanding, and no notice of election to consider it all due shall be necessary except suit or foreclosure.

And it is further expressly agreed, that as often as any proceeding is taken to foreclose this mortgage, as hereinafter provided, or in chancery, said first party shall pay to said second party two hundred dollars, as a
reasonable attorney's or solicitor's fee therefore, in addition to all
207 other legal costs and actual expenses incurred by first party for
such foreclosure.

And upon default being made in any condition of this mortgage, or in case of non-payment of the said sum of fourteen thousand seven hundred and fifty and $\frac{10}{100}$ dollars, or of the interest thereof, or of said taxes, or assessments, or any part of said principal or interest, taxes, assessments, or if the principal becomes due and payable as aforesaid by reason of the non-payment of interest, taxes, assessment, at the time, in the manner and at the place above limited and specified for the payment thereof, then and in such case it shall and may be lawful for the said party of the second part, his heirs, executors, administrators or assigns, and the said party of the first part does hereby empower and authorize the said party of the second part, his heirs, executors, administrators or assigns, to grant, bargain, sell, release and convey the said premises, with the appurtenances, at public vendue, and on such sale to make and execute to the purchaser or purchasers, his, her or their heirs and assigns, forever, good, ample and sufficient deed or deeds of con-
veyance in law, pursuant to the statute in such case made and
208 provided, rendering the surplus moneys (if any there should be) to
the said party of the first part, its successors, after deducting the amount then due, the said attorney or solicitor's fee, and the costs and charges of such vendue and sale aforesaid.

The aforesaid notes were given for the purchase price of the aforesaid lands, and this mortgage is given to secure the payment thereof.

In witness whereof, the party of the first has hereunto set its seal the day and year first above written and executed these presents by its Vice-President, Stephen Bronson, and by its Secretary, Finley D. Brown, who by its articles of association are authorized to execute such instruments.

Big Rapids Imp. & M'f'g. Co. [SEAL.]
STEPHEN BRONSON, *V. Pre't.* [SEAL.]

Attest:

{ BIG RAPIDS IMP. AND MAN'F' CO. SEAL. }

F. D. BROWN, *Sec'y.* [SEAL.]

Signed, sealed, and delivered in presence of—
Chas. A. Stickney.
C. H. Miller.

209 STATE OF MICHIGAN,
County of Mecosta, ss:

On this 24th day of September, A. D. 1874, before me, a notary public in and for said county, personally appeared Stephen Bronson, known to me to be the person described in and who executed the within deed as Vice-President of the Big Rapids Improvement and Manufacturing Company, who being by me duly sworn testified that he resides in the city of Big Rapids in said county; that he is Vice-President of the Big Rapids Improvement and Manufacturing Company; that he knows the corporate seal of the said company; that the seal affixed to the within instrument is such corporate seal; that it was so affixed by order of the board of directors of the said company, and that he signed his name to the within instrument as Vice-President of the said company by the like order.

F. FAIRMAN,
Notary Public, Mecosta Co., Mich.

210 Whereas Wm. Buchtel, of Akron, Ohio, has by deed bearing date the 29th of July, 1874, conveyed to the Big Rapids Imp't & Manuf'g Co. the following described lands, viz: The N. $\frac{1}{2}$ of SE. $\frac{1}{4}$, the S $\frac{1}{2}$ of NW. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, of sec. 22; the SW. $\frac{1}{4}$ and S. $\frac{1}{2}$ of SE. $\frac{1}{4}$, the NE. $\frac{1}{4}$, of SE. $\frac{1}{4}$, of sec. 16; the E. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of sec. 4; the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of sec. 2; all in township 21 N., R. 8 west; total of 819 acres of land, and the said Big Rapids Imp. & M'f'g Co. has executed a mortgage to the said Buchtel to secure the payment of the purchase price thereof, and the said Big Rapids Imp. & M'f'g Co. has contracted to deliver to the said Mason Lumber Company a quantity of pine saw-logs to be cut from said lands above described:

Now, therefore, it is understood and agreed by and between the said Buchtel and the said Mason Lumber Company, that for the saw-logs which the said Big Rapids Imp. & M'f'g Co. shall deliver from said described lands on and in accordance with said contract which bears date Sept. 17, '74, the said Mason Lumber Co. shall reserve from the paym'ts which may
hereafter become due from said Mason Lumber Co. to said Big
211 Rapids Imp. & M'f'g Co. on said contract between them to the
amount of two and $\frac{50}{100}$ dollars per M feet, board-measure, and pay the same to said Buchtel on or before the 23d day of September, 1875, as in full payment for any and all claims on the said timber for so many logs as they may receive from said Big Rapids Imp't & M'f'g Co. on said contract cut from lands above described.

The said Big Rapids Imp't & M'f'g Co. hereby agrees and subscribes to the above understanding. Such payments to be applied by said Buchtel on said mortgage, and the said Buchtel, pursuant to the foregoing written understanding, hereby grants and permits to the said Big Rapids Imp't and M'f'g Co. and the said Mason Lumber Co. the right to immediately enter upon, cut, and remove the timber from said lands.

Dated at Muskegon, Sept. 25th, 1874.

WILLIAM BUCHTEL.
BIG RAPIDS IMP. & M'F'G CO.,
By S. BRONSON, *V. Pres't.*
MASON LUMBER CO.,
THOMAS MUNROE, *Sec'y.*

Exhibit F of pl'ff proofs. J. W. Ransom, referee.

212

213 *Exhibit D of def't's proofs.—J. W. Ransom, referee.*

This agreement made and entered into at the city of Muskegon, Muskegon County, and State of Michigan, this 17th day of September, A. D. 1874, by and between the Big Rapids Improvement and Manufacturing Company, of Big Rapids, Mecosta Co., Michigan, and the Mason Lumber Company, of said city of Muskegon, as follows, to wit:

The said Big Rapids Improvement and Manufacturing Co., representing to be the owners of and having the undisputed right to dispose of the timber on the following described pine lands, to wit:

The NE. ¼ of sec. 18; N. ½ of NW. ¼ of sec. 18; the SE. ¼ of sec. 8; the NE. ¼ of NW. ¼ of sec. 8; SE. ¼ of SE. ¼ of sec. 4; total 480 acres, all in town. 21 N., R. 7 west; also, N. ½ of SE. ¼, the S. ½ of NW. ¼ and the NW. ¼ of NW. ¼ of sec. 22; the SW. ¼ & S. ½ of SE. ¼, the NE. ¼ of SE. ¼ of sec. 16; the E. ½ of SE. ¼ and the NW. ¼ of sec. 4; the E. ½ of NE. ¼, the NW. ¼ of NE. ¼, and the NE. ¼ of NW. ¼ of sec. 2, all in town 21 N., R. 8 west; total 819 acres in last-named town. from a part of last-named lands, i. e. in sections 2, 4, and SW. ¼ of 16 in town 21 N., R. 8 W.

The said Big Rapids Imp't & Manuf'g Co. have contracted with Elisha Eldred to sell and deliver two and one-half millions feet of timber,
cut into saw-logs. Now the said Big Rapids Imp't and Manuf'g
214 Co. further proposes and hereby agrees to sell, cut, haul, and de-
liver to the said Mason Lumber Co. four million feet, board-measure, or more of white pine saw-logs, to be cut from the timber on the lands described in sections 4, 8 and 18, in township 21 N., R. 7 W., and sections 22; S. ½ and NE. ¼ of SE. ¼ of sec. 16, town. 21 N., R. 8 W.; and in no case to include any of the timber or lands described as reserved for filling the contract with said Eldred; and should the other lands described yield more than four million feet of logs suitable to the requirements of this contract the said Big Rapids Imp. and Manuf'g Co. hereby stipulate and agree that the said Mason Lumber Co. shall have the right to them on this contract should they so elect at any time prior to the delivery of the four million feet hereby agreed upon to be delivered them. The logs to be delivered under this contract shall all of them be first-class white pine, mainly of timber known as cork or pumpkin pine, to be 18 inches and upwards in diameter at the small end, and of average size, not to require more than three logs to make one thousand feet of sound, merchantable lumber.

It is also agreed and understood that the timber shall not be cut up into the limbs and tops, and that all logs to be scaled on this contract
shall be free from butt-shakes, ring knots, punk knots, large
215 knots, or unsound bulges, and shall be cut into 12, 14 & 16 f't
lengths, mostly 16 f't, not varying more than two inches, and in no case to be less than one of the above lengths; The understanding being that the logs to be delivered under this contract shall be a strictly number-one lot of logs, and shall be delivered by and at the expense of the said Big Rapids Imp. and Manuf'g Co. afloat in the main Muskegon River in time for the main drive on said river in the spring of 1875.

In consideration of the faithful delivery of all the logs as above stipulated and the performance of the covenants and agreements of the said Big Rapids Imp. & Manu'g Co., free and clear from any and all liens or claims from or by other parties on or to any of said logs and timber, the said Mason Lumber Co. hereby agree to pay for the said logs at the rate of ten (10) dollars per thousand feet, board-measure, in the manner following, to wit: On execution of this contract the sum of thirty-five

hundred (3,500) dollars; October 10th, 1874, two thousand (2,000) dollars; November 10th, 1874, three thousand (3,000) dollars; December 10th, 1874, three thousand (3,000) dollars; January 10th, 1875, three thousand (3,000) dollars; February 10th, 1875, three thousand (3,000) dollars; March 10th, 1875, twenty-five hundred (2,500) dollars; 216 April 10th, 1875, two thousand (2,000) dollars; May 10th, 1875, two thousand (2,000) dollars; June 10th, 1875, thirty-five hundred (3,500) dollars; July 10th, 1875, thirty-five hundred (3,500) dollars; August 10th, 1875, three thousand (3,000) dollars; September 10th, 1875, three thousand (3,000) dollars; Octo. 10th, 1875, three thousand (3,000) dollars.

The above and foregoing shall be the basis for payments, provided always that the said Big Rapids Imp. and Man'f'g Co. shall commence without unnecessary delay and continue to prosecute the work under this contract with vigor, as fast as shall be necessary to accomplish the delivery of the logs within the time stipulated. The first payment, thirty-five hundred dollars, to be paid by said Mason Lumber Company's acceptance for two thousand dollars payable sixty days from date. The balance, fifteen hundred dollars, to be paid in like manner as soon as said Big Rapids Imp't and Manuf'g Co. shall produce satisfactory receipts, permit to cut and sell the timber from the lands described, or other evidence that the parties from whom said company purchased the said lands have no lien, claim or interest whatever in the land or timber described which shall in any manner affect the said Mason Lumber Co., or make them liable in any manner beyond the conditions of this contract.

217 Further, if on the maturity of any of the following payments, the said Mason Lumber Company shall desire it, the said Big Rapids Imp't and Manuf. Company shall receive in lieu of the cash the acceptances of said Mason Lumber Company on 30 or 60 days. The scaling of said logs shall be done by Samuel Tiffany or some other party to be agreed upon at the mutual expense of the parties hereto; no charge to be made for boarding the scaler.

It is further agreed on the part of said Big Rapids Imp't and Manuf'g Co., that with the permit to cut above-named lands and the release from all liens, claims, or future demands from W. H. Buchtel, from whom said company purchased the land described, the said company shall make to said Mason Lumber Company a bill of sale, or such other security on the said land or timber as shall secure said Mason Lumber Co. against loss on account of payments and advances made on this contract.

Executed at Muskegon the day and year above written.

BIG RAPIDS IMP. & M'F'G CO.,
By S. BRONSON, *V. Pres't.*
MASON LUMBER CO.,
THOMAS MUNROE, *Sec'y.*

218 UNITED STATES OF AMERICA.

The circuit court of the United States for the sixth circuit and western district of Michigan.

THE MASON LUMBER CO., DEFENDANT,
ads.
WILLIAM BUCHTEL, PLAINTIFF.

And now comes the said defendant by its attorneys Smith, Nims &

Erwin, and excepts to the findings of law and the many errors therein made and filed by the referee in his report in this case, on the day of April, A. D. 1876.

1st. In that the said referee in the construction put by him on the so-called guaranty, Exhibit B in this cause, in his 3rd finding of law in his said report.

2nd. In that the referee's construction of said Exhibit B makes said instrument create a twofold liability on the part of this defendant of an inconsistent character, and one of which liabilities is not supported by any consideration, as follows:

A. That it shall pay the payments as they fall due in Exhibit
219 A, supported by the. permission given by plaintiff to cut the
timber.

B. To pay in full for so much land as may be cut over prior to Sept. 23rd, 1875, and the timber removed. Supported by no consideration and which is not a part of the liability of the contract guaranteed.

C. That in and by his construction of Exhibit B he makes the liability of the guarantor greater than that of the maker of the original promise.

D. To support his construction he separates the undertaking of the guarantor into two independent liabilities.

E. That the Big Rapids Imp. & M'f'g Co. might be, would be hastened in its payments on contract A, if the timber were cut and removed on or before the 23rd day of Sept., 1875, by the agreement of plaintiff and defendant.

F. In that he finds the sum of $3,068.46, payable by contract A, on the 1st January, 1875, and was due said plaintiff at the time of the commencement of this suit as against said defendant, if said defendant is otherwise liable.

3rd. In that the referee found the defendant had reasonable notice of
the non-payment by the Big Rapids Imp. and M'f'g Co. of the instal-
ment due Jan. 1st, '75, for the recovery of which this action is
220 brought, and that the notice of non-payment received by defend-
ant was sufficient to charge it as a guarantor in this case, and that
it is not discharged for want thereof.

A. In that the referee finds as a matter of law that it was not necessary to give the notice of demand and non-payment at the place where the same is made payable.

4th. In that the referee found that there was no variance between the proof and the declaration in this cause on the part of the plaintiff.

In that the plaintiff counts on a guarantee according to its tenor and effect of certain payment in another contract named, and that the proofs support the declaration in that particular.

5th. In that the referee made use of the fact or statement of the de-
fendant Mason, made about the time the assignment and contract of
guaranty had been agreed upon and settled, and about the time of the
execution thereof Mason, president of the said defendant, remarked to
plaintiff, "If the timber is there it is all right, and the Big Rapids Imp.
& M'f'g Co. has a good thing," to the prejudice of the defendant, when
upon the trial of the cause the referee refused to permit said
221 Mason to give the circumstances and fact surrounding such re-
mark or what led to it, and in that it was error to consider a part
of that conversation last above-named and referred to and refuse to per-
mit the whole to be given.

A. In that the referee erred in his application of the law relating to fraud to the facts found by him in his report herein in the 6th finding of law.

6th. In that the referee erred in prescribing his reasons for the findings in the shape of an argument.

*7th. In that the referee erred in finding a judgment in favor of the plaintiff in this case.

In that the referee erred in not finding the law and the facts separately, as required by the statute.

8th. In that the referee erred in refusing to find upon the following points as material facts in this case, as requested by the defendant.

1. That Exhibit A was assigned to the defendant by the Big Rapids Imp. & M'f'g Co. as security.

9th. In that the referee erred in the construction put by him on 222 Exhibits G & F, in his finding of facts in this, that Exhibit F was not given for the purpose assigned by the referee in his finding, to wit, to pay 2.50 per M stumpage on all logs or timber the Mason Lumber Co. should get from the lands named in Exhibit G.

That the said referee erred in not finding as matter of law the following requests of defendant:

1st. Under all the testimony in this case offered as matter of law that the plaintiff is not entitled to recover and defendant is entitled to judgment of no cause of action.

2d. There is no evidence tending to maintain a cause of action against the defendant.

3rd. As there is no testimony in the case showing that the defendant corporation had never authorized Lyman G. Mason after the execution of Exhibit B and had ever ratified any such promise, if any was made, therefore such promise could not be binding on defendant.

SMITH, NIMS & ERWIN,
Att'ys for Def't.

Filed July 21st, 1876.

223 WILLIAM BUCHTEL
vs.
THE MASON LUMBER COMPANY. } No. 791.

NOVEMBER 16, 1876.

This cause came on to be heard upon exceptions to the report of the referee heretofore made, and after listening to the arguments of counsel, and due deliberation having been had thereon, ordered that the same be had and hereby are overruled.

224 WILLIAM BUCHTELL
vs.
MASON LUMBER COMPANY. } No. 791.

NOVEMBER 28, 1876.

This cause having been referred by consent of parties to James W. Ransom, one of the attorneys of this court, for trial, and said referee having filed his report therein, and said defendant having filed exceptions to said report and to the proceedings before said referee, and said exceptions having been heretofore overruled by this court and the report of said referee duly confirmed, and it appearing to the court now here from said referee's report that said defendant did undertake and promise in manner and form as the said plaintiff hath in his declaration in said cause complained against it, and that he has sustained damages by reason of the premises over and above his costs and charges by him about his suit in that behalf expended the sum of three thousand six hundred sixty-seven and $\frac{50}{100}$ dollars and interest from this date at ten per cent. per annum.

225 Therefore it is considered by the court that the said plaintiff do recover against said defendant the sum of his damages aforesaid, with interest thereon at ten per cent. per annum from this date, together with his costs and charges to be taxed, and that he have execution thereof.

On application, it is further ordered that the proceedings in said cause, except the taxation of costs, be and the same are hereby stayed for sixty days, to enable the defendant to settle a bill of exceptions.

226 To the admission and reading of which said record to the jury the counsel for the defendant did then and there object on the ground that the same was incompetent, irrelevant, and immaterial, but the court overruled the objection and permitted said record to be read to the jury.

Upon the trial of said cause, to maintain the issue upon its part, the defendant called as a witness Stephen Bronson, who, being first duly sworn, gave evidence tending to show that at all the times mentioned and set forth in the declaration he was the vice-president of the Big Rapids Improvement and Manufacturing Company; that in July, 1874, he purchased of the plaintiff certain pine lands in town 21-8; that he took a conveyance of those lands, but gave no security back at the time of the purchase; and in September of that year entered into negotiations with him for the purchase of the land in question, being lands in town 21-7.

The defendant, further to maintain the issue on its part, propounded to witness Bronson the following question:

At the time you made this first purchase in 21-8, was there any talk between yourself and Mr. Buchtel with reference to your purchase of 21-7 or any portion of the lands there? 227

To which the counsel for the plaintiff then and there objected as follows: "I object to it. You are asking now if at the time of that sale in 1874 anything was said about this subsequent sale?"

To which the counsel for the defendant answered: "Yes, sir."

The counsel for the plaintiff then said: "Will you state what you expect to show by that?"

To which the counsel for the defendant replied as follows: "I now offer to show by this witness generally that there was a conversation between the plaintiff and the witness at or about the time of the purchase of lands in 21-8, looking to the future sale by the plaintiff to the Big Rapids Improvement and Manufacturing Company of the lands in 21-7, and I propose to follow that up by showing that subsequent to that time a contract was entered into between the Big Rapids Improvement Company and the defendant in this case for furnishing logs in the lands 21-7. After which negotiations were entered into between the plaintiff and the same company for the purchase of those lands, which ripened into a contract which contained a provision that no timber should be 228 cut from the lands; that subsequent thereto, and on the 25th day of September, 1874, Mr. Bronson, as the representative of the Big Rapids Improvement and Manufacturing Co., and Mr. Buchtel, on his own behalf, visited the city of Muskegon and had an interview with the defendant through its president, Mr. Mason, and its secretary, Mr. Munroe, and such negotiations and representations were then and there made that Mr. Bronson, on his own account and on account of the company which he represented, and Mr. Buchtel, on his own account, falsely represented that there was on the lands 21–7 fifty-seven hundred thousand feet of merchantable pine timber; that they both produced a plat upon which were figures indicating that there was that amount of timber there, and that relying upon those representations, and believing them to be true from the plat thus exhibited, the defendant entered into the guaranty in question upon which this suit is brought; that those representations were false, and that the lands contained only about eight hundred thousand feet of merchantable timber."

To which question the counsel for the plaintiff did then and there object on the ground that upon the statement of counsel it is the
229 same matter litigated and decided by a judgment in this court rendered upon it, the same judgment proved by the plaintiff in this cause for the purpose of laying an estoppel, and that the question is not material except as toward an initiatory step.

Thereupon the court inquired of the counsel for the defendant: "Did you propose to show that in the purchase of lands 21–8, that there were any representations made as to the timber upon 21–7?"

To which the counsel for the defendant replied: Not that. But I propose to show that there were negotiations then inaugurated which led up to the purchase of the lands; if the subject is one which could be gone into it would be re*vel*ant because it would show a history of the transaction."

The court then said: "Then, under the statement of counsel, it raises the whole question."

In the course of the argument as to the admissibility of the evidence called for by the question, the counsel for the plaintiff interposed the further objection that parole testimony of representations or warranty would be inadmissible for the reason that the contract between the parties had been reduced to writing.

230 The court then made the following ruling: "The result of my conclusions is to overrule the objections which were interposed on the ground that the matters sought to be litigated had been adjudicated in the former suit, but inasmuch as it is conceded that the question of the admissibility of parole testimony arises, and as we believe such testimony to be inadmissible, it substantially, we think, puts an end to the defense in this case."

Mr. Storrs, of counsel for defendant, then said: "The question of the plat has not been considered."

And thereupon the court said: "We think that will make no difference. We will let you make the offer and overrule it, and we will instruct the jury to render a verdict for the plaintiff for the amount claimed in the declaration."

The defendant further, to maintain the issue upon its part, proposed to show by said witness that the assignment to the Mason Lumber Co. was collateral only; that the assignment of the contract between the plaintiff and the Big Rapids Improvement and Manufacturing Co. was intended only as security, so understood by the plaintiff and all the parties, and that the quantity of timber upon the land was the moving inducement to the guaranty.

231 And thereupon the counsel for the plaintiff said: "That would be immaterial and irrelevant to the issue."

The defendant, further to maintain the issue upon its part, offered the plat in evidence which is attached to the record in the first cause, and proposed to show by the witness Bronson that that plat belonged to the plaintiff; that it was exhibited by the witness and the plaintiff to the defendant at Muskegon, and used by them for the purpose of showing the defendant the quantity of timber upon the land; and that the plaintiff then and there represented the plat and the representations upon the plat to be true.

To the reading of the said plat to the jury and the evidence offered, counsel for the plaintiff then and there objected on the ground that the same was irrelevant, incompetent, and immaterial, and upon the further ground that said facts thus sought to be proven were precluded by the judgment in the former suit, and that said evidence could not be admitted upon the ground that it was contradicting a written guaranty by parole.

The defendant, further to maintain the issue upon its part, then offered to show by the witness Bronson that the figures upon the plat
232 1,200, 1,800, 1,700, 1,000, indicated a quantity of timber upon the
various sections upon which those figures were, 1,000 standing for 1,000,000 feet, 1,800 standing for 1,800,000 feet, 1,200 standing for 1,200,000 feet, 1,700 for 1,700,000 ft.

To the giving of which said evidence to the jury counsel for the said plaintiff then and there objected on the ground that it could not be received, being parole, and, second, that it was res adjudicata.

The defendant, further to maintain the issues upon its part, offered to prove by the witness Bronson that this plat was used by the plaintiff and Bronson pending those negotiations for the purpose of arriving at the fact as to the amount of timber upon the land; that it was taken by Bronson after the contract was concluded with the consent of the plaintiff, and has since that time been demanded by the plaintiff from Bronson as his own property, to the giving of which said evidence to the jury the counsel for the plaintiff then and there objected as irrelevant to the issue, as involving matters res adjudicata, and is not admissible by parole.

The defendant, further to maintain the issues upon its part, then offered in evidence a copy of the plat in question annexed to the
233 defendant's copy of the land contract and the guaranty upon
which suit is brought, and proposed to show by the witness Bronson that a copy of this plat was made by Mr. Mason, representing the defendant, during those negotiations in the presence of the plaintiff, and by Mr. Mason annexed to his copy of the contract as forming a part of it, also in the presence of the plaintiff.

To the giving of which said evidence to the jury counsel for the plaintiff then and there objected as irrelevant to the issue, as involving matters res adjudicata, as not admissible by parole, and as secondary.

The defendant, further to maintain the issues on its part, offered to prove by the witness Bronson that Mr. Mason, in the presence of Buchtel and Bronson and before executing the guaranty, made and submitted to Buchtel and Bronson estimates of the value of the timber and for the purpose of determining whether the defendant would execute the guaranty or not, to which the counsel for the plaintiff then and there objected as irrelevant to the issue.

And the defendant, further to maintain the issues on its part, offered to prove generally by the witness Bronson that during these negotiations Mr. Buchtel, the plaintiff, represented to Mr. Mason that there was upon the land in controversy 5,700,000 feet of merchantable pine

234 timber; that these representations were made as an inducement to the defendant to execute the guaranty.

To which the counsel for plaintiff objected as irrelevant and immaterial, and on the ground that the facts offered to be proved were res adjudicata and not admissible by parole.

And the defendant, further to maintain the issues on its part, proposed to prove by the witness Bronson that the witness and Buchtel went to Muskegon for the express purpose of securing the guaranty from the defendant, and that all the representations and assurances made by the witness to the defendant were made in the presence and hearing of the plaintiff and with his acquiescence and assent; also that the witness knew nothing of his personal knowledge at that time as to the quantity of timber on the land.

To which the counsel for the plaintiff objected as immaterial and irrelevant, and also coming within the rule that parole evidence cannot be received, and also within the res adjudicata.

The counsel for the defendant then said this evidence is offered on two grounds: First. To establish a warranty; next to show total failure
235 of consideration. And thereupon the court said: "I understand that these offers are made with a view of laying a foundation for proof such as has already been ruled upon."

To which the counsel for the defendant replied, "That's it."

The court then said: "That being the understanding, all the offers are overruled."

To which said ruling of said court counsel for the defendant did then and there except and still excepts.

The court then stated as follows: "In the abstract as abstract questions, I should think some of the offers were admissible, but taken as a whole and with the object as I have stated we think the testimony is inadmissible and overrule the offers."

The defendant further to maintain the issues on his part offered to show by Mr. Mason himself the making of this plat, and that the representations were the moving inducement to the guaranty, and that Mr. Mason himself made the plat and attached it, and further offered to show that there was upon the land at the time this contract was entered into about eight hundred thousand feet.

To which the counsel for the plaintiff objected, that the defense having been ruled out this would follow the rest.

The court sustained the objection on the ground that the testimony offered was immaterial.

236 To which ruling of the court the counsel for the defendant then and there excepted and still does except.

The defendant then rested its case.

Whereupon the court directed the jury to find a verdict in favor of the plaintiff and against the defendant for the sum of $10,628.36, being the amount of the last three instalments due upon said contract.

To which direction of said court to the jury the counsel for the defendant then and there excepted and still excepts.

Whereupon, under the instruction and direction of said court, the jury then and there rendered a verdict in favor of the plaintiff and against the defendant for the sum of $10,628.36.

And after said jury had rendered their verdict in said cause, the defendant filed its motion in writing in said cause for a new trial in said cause, assigning as grounds of said motion the rulings of the court hereinbefore set forth and excepted to, which motion was afterwards overruled by said court, to which ruling of said court defendant did then and there except.

Whereupon the court directed judgment to be entered in favor of the plaintiff and against the defendant, and judgment was entered 237 accordingly on the 3rd day of February, 1877, for the sum of $10,800.81.

And inasmuch as the matters and things aforesaid do not form a part of the records of said cause, the defendant has made this its bill of exception, and prays that the same be signed, sealed and made a part of the record aforesaid, which is accordingly done this 18th day of April, 1877.

[SEAL.] S. L. WITHEY,
Dist. Judge.

(Indorsed:) United States of America, western district of Michigan, ss. In the circuit court of the United States for the western district of Michigan. William Buchtel vs. The Mason Lumber Company. Bill of exceptions. Received and filed April 18th, 1877. Chester B. Hinsdill, clerk circuit court.

238 The circuit court of the United States, western district of Michigan. October term, 1876.

WILLIAM BUCHTEL
vs. } Assumpsit on a contract of guaranty.
MASON LUMBER CO.

Motion by defendant for a new trial.

Taggart, Simonds & Fletcher, and D. Darwin Hughes for pl'ff.

Smith, Nims & Erwin, Eggleston & Kleinhaus, and E. A. Storrs for def't.

Decision by court, Feb'y 3d, 1877

WITHEY, judge:

The questions presented by the motion for a new trial in this case are purely legal ones. Evidence offered by defendant was not admitted, and as it constituted the sole ground of defence a verdict was rendered for the plaintiff. Error in excluding the offered evidence is the sole ground of the motion.

That the verdict operates as a hardship upon defendant is apparent, and in such cases a court naturally seeks for some lawful way to afford relief. The evidence rejected at the trial was defendant's offer to prove a parol contract of warranty by plaintiff made contemporaneous 239 with the written contract of guaranty made by defendant to plaintiff. The facts developed at the trial and the manner in which the question arose will appear from a statement of the case. September 23d, 1874, plaintiff contracted in writing to sell to the Big Rapids Improvement and Manufacturing Co., a corporation doing business at Big Rapids, Michigan, of which Stephen Bronson was vice-president and agent, eight descriptions of land comprising six hundred eighty-one and $\frac{85}{100}$ acres, and to give conveyance after full payment of the purchase price. The Big Rapids Imp. & M'f'g Co. agreed to pay therefor $12,273.84, as follows: $3,068.46 January first, 1875, with interest, and the balance in three equal annual installments, the first thereof on the 23d day of September, 1875, with interest, &c.

The contract contained this stipulation, viz: "No timber is to be cut or removed from said land without the written permission of first party endorsed on this contract"; Buchtel, the plaintiff, being the party of the first part. It may be assumed that the object of the purchase was mainly the timber supposed to be on the land; this we think is apparent from the terms of the guaranty subsequently given by defendant, and which formed the subject of this suit.

240 On the 25th of September, two days after the date of the contract, Bronson and Buchtel were at Muskegon, Michigan, and the following instrument of guaranty was executed by which the Big Rapids Imp. & M'f'g Co. assigned said land contract to the Mason Lumber Co., defendant in this suit, and the latter company, which is a corporation doing business at Muskegon, of which Lyman G. Mason is president and agent, guaranteed payment to Buchtel of the purchase price of the land, Buchtel joining in the instrument for the purpose of giving permission to enter upon the lands and cut and remove the timber therefrom. The instrument is as follows:

MUSKEGON, MICH., *Sept.* 25, 1874.

In consideration of the sum of one dollar, the receipt of which is hereby acknowledged by the Big Rapids Imp. and Manuf'g Co., and for other valuable considerations, the Big Rapids Imp. & Manuf'g Co. hereby assigns the contract hereto attached of date Sept. 25, 1874, between William Buchtel, of Akron, Ohio, and said Big Rapids Imp. & M'f'g Co; the said Buchtel hereby assenting to this assignment with the understanding that said Mason Lumber Co. hereby guarantees the payments as stipulated in said contract, upon which guaranty permission is hereby given to enter upon, cut, and remove the timber upon the lands
241 embraced in said contract hereto attached, it being understood that as fast as the timber is cut and removed from said land or any part thereof the purchase price shall be due and payable; that is to say, for all said land which may be cut before the 23d day of Sept., 1875, the full purchase price shall be paid on that date.

(Signed) BIG RAPIDS IMP. & M'F'G CO.,
By S. BRONSON, *Vice President.*
WILLIAM BUCHTEL.
MASON LUMBER CO.,
By THOMAS MUNROE, *Sec'y.*

Tested by its corporate seal.

The suit was upon this guaranty: Plaintiff to prove his case read in evidence the land contract of Sept. 23, 1874, between himself and the Big Rapids Imp. & M'f'g Co., the assignment thereof, which, though the Mason Lumber Co. is not named as the assignee therein, was treated to be the assignee, the guaranty of defendant, and plaintiff's permission therein contained that the timber on the lands described in the contract might be cut and removed; also a stipulation filed in the cause admitting that the timber on the contract lands was all cut and removed in 1874 and 1875, prior to the commencement of this suit, and prior to Sept. 23d, 1875; and lastly, a judgment with the records and files in a suit in this court brought by plaintiff against defendant upon said
242 guaranty to recover the first installment of the purchase price of said lands stipulated in said land contract of Sept. 23d, 1874, of

$3,068.46 and interest, due January 1st, 1875, and in which suit plaintiff recovered judgment. In that suit defendant, under the plea of the general issue, gave notice and offered proof, as appears by the records and files in the case, of "false and fraudulent representations, undertakings, and promises," by plaintiff in procuring the guaranty, and the referee who tried the case found there were no fraudulent representations. Hence such judgment was offered and received as res adjudicata on the question of alleged fraud on the part of plaintiff in connection with the instrument of guaranty.

Plaintiff claimed the judgment was also res adjudicata upon the question of warranty interposed in this suit by way of defence, but we held that the referee did not decide that question, and therefore limited the effect of the former suit to the question of fraud.

In the present suit defendant, by way of notice, has pleaded as a defence to the action that plaintiff knowing the inducement for defendant's executing the guaranty was to obtain the amount of timber which was represented to be on said lands, viz, 5,700,000 feet, and
243 to induce defendant to make said guaranty warranted that said
representations were true and that said lands would yield 5,700,000 feet of merchantable pine, whereas they only yield one million one hundred thousand feet. By reason of which representations and warranty by plaintiff defendant was induced to and did execute said guaranty, which representations were untrue, &c., by reason whereof defendant has sustained damages which he will recoup in this action, &c.

Under this notice defendant then offered to prove by Stephen Bronson that at the time of the execution of said contract of guaranty, plaintiff, by parol, warranted to defendant that there were 5,700,000 feet of pine timber on said lands. For the purpose of proving such warranty defendant offered to show by the witness that the written assignment by the Big Rapids Imp. & M'f'g Co. of said land contract to defendant was intended only as security; that the leading inducement for defendant's guaranty was the quantity of timber represented as being on said lands, and further offered in evidence a plat of said lands, upon the particular descriptions of which were figures indicating the
244 quantity of timber thereon, aggregating 5,700,000 feet, and of-
fered to prove that said plat was present at the time of the negotiations; was used to show the quantity of timber on the lands; that said plat belonged to plaintiff and constituted his representations; but it was conceded that the plat had not been in plaintiff's possession for a year or more, and that Bronson produced it on the occasion of said negotiations, and that the figures on the plat had been changed since it left plaintiff's possession. Defendant also offered to prove the actual quantity of timber upon said lands at the date of the contract of guaranty.

We held the evidence not admissible upon the well-settled rule that parol contemporaneous evidence cannot be allowed to contradict, add to, or vary the terms of a valid written instrument, and that the evidence offered would, if admitted, both contradict and vary the written contract of guaranty.

Because of such ruling this motion has been made for a new trial, and it is urged—

First. That as a contract of warranty need not be in writing, parol evidence of such contract is admissible, and especially if the warranty constitutes or is a part of the consideration for the written contemporaneous contract.

245 Second. That it is competent for the purpose of showing the

consideration upon which the contract of guaranty was made and that there has been a failure of consideration.

The authorities upon both sides have been very fully presented by learned counsel and examined and considered; were they not so numerous we should take pleasure in giving an analysis of and our views upon them. We have not the time now, inasmuch as an early decision is desired before the time shall expire for filing a supersedeas bond on a writ of error to the Supreme Court should either party desire a review.

We understand the law to be well settled that where from the nature of the instrument and what it contains, the whole contract must be presumed to have been reduced to writing, parol proof can not be given of what was said, or of any oral agreement made previously, or at the same time, which would have the effect to contradict, add to, or vary the written contract. The presumption being in such cases that the writing contains the entire agreements of the parties as finally concluded between them, and they are estopped from denying it. This rule does not, however, prevent the parties from showing fraud in securing the
contract. (1 Greenleaf Ev., Sec. 275; Van Ostrand vs. Reed, 1
246 Wend, 424, 431; Mumford vs. McPherson, 1 Johnson R., 414;
India Rubber Co. vs. Adams, 23 Pick. R., 257; Smith vs. Dallas, 35 Ind. R., 255–260; Robinson vs. McNeill, 51 Ill., 225; Helmrichs vs. Gehreke, 56 Mo., 79; Randall vs. Rhodes, 1 Curtis C. C., 90; Dean vs. Mason, 4 Conn., 428; Martin vs. Hamlin, 18 Mich., 354; Vander Walke vs. Thompson, 19 Mich., 82.)

In Oelricks vs. Ford (23 Howard, 49), which presented the question whether it was admissible to show by parol evidence an understanding of the parties that the contract was made subject to a certain usage, the Supreme Court of the United States at page 64 say, "any conversations and verbal understanding between the parties at the time were merged in the contract, and parol evidence is inadmissible to engraft them upon it."

The matter sought to be shown by defendant in the case at bar was parol warranty. It is argued that warranty may be shown by parol, because it is not a contract required to be in writing. This general rule is not disputed. Again it is contended that the parol warranty may be proved for the purpose of showing failure of consideration. Cases are
cited in support of this proposition, but mainly they come within
247 the category of cases where the instrument was executed not as
the contract of the parties, but in execution of some of the terms of a contract, as a deed, mortgage, note or the like, and which do not purport to state the agreements and understanding of the parties.

In contracts of sale between vendor and vendee warranty may be shown either to limit the amount of recovery or to defeat the action altogether depending upon whether warranty and breach show total or partial failure of consideration.

But nevertheless, a parol warranty cannot be shown for any purpose in the absence of fraud or mistake if the effect will be to contradict, add to, or vary the terms of a written contract between the parties, made at or previous to the time of entering into it; certainly not unless the warranty and breach amounts to a total failure of consideration.

The courts of Pennsylvania have, however, permitted parol evidence to show the entire agreements of the parties when the writing does not contain them in a class of cases, and perhaps it is difficult to say where they draw the line. Such was the rule held in Powelton Coal Co. vs. McShain, 75 Penn. st., 245.

Suit on the common counts for carrying goods, defendant set up
248 by way of defence that the freighting was done under a written
contract, and introduced and proved the contract. Plaintiff then showed that the original contract was an oral one, and that subsequently plaintiff's agent reduced it to writing and it was signed by the parties. But defendant proved that a material stipulation as to the time when the coal was to be delivered, to be carried was omitted, and instead was inserted words which permitted the Co. to deliver the coal at such times as it may desire. That def't, when signing the contract, discovered the change and called attention to it, when pl'ff's agent replied "that is understood," and said the Co. intended to furnish the coal within the time. The court held evidence to show what the oral agreement was was admissible on the ground that to take advantage of the omission in the contract as reduced to writing was a fraud on the defendant. If it was a fraud on defendant then the case is within the rule which is always applied to defeat fraud in contracts.

The case of Weaver vs. Wood (9 Penn. st., 220), is cited by defendant. Weaver held a lease of Wood's premises, and gave a written surrender of the lease for the expressed consideration of one dollar and a release from payment of rent. At the same time Wood agreed by parol
249 that he would build another hotel on the same premises to replace
one burnt and give Weaver another lease of the premises at a fair rental. Wood built and leased to a stranger. Weaver sued on the parol agreement for a lease. The court held that "the executed contract and the executory one are distinct and without connection further than that the former is the consideration of the latter," and that Wood could not insist that his promise was controlled by the consideration of the surrender.

Whatever may be said of the reasoning of the case and its conclusions, we do not think it should be allowed as authority for permitting a written contract which purports to give the agreements of parties to be contradicted or varied by a parol contemporaneous contract.

Defendant also cited Bisshor vs. Forbes (36 Md., 154). A corporation purchased by one of its officers and stockholders a steam engine of plaintiff's, it being agreed that pl'ffs would alone look to the corporation for payment, but subsequently sought to hold the stockholders individually liable, as they had not paid in full their subscribed stock. The court held plaintiffs bound by their agreement to look to the corporation alone and that they could not recover from the stockholders. The ground of the decision was that the oral agreement was as to
250 collateral matters about which the written contract was silent.
The oral agreement did not tend to contradict, add to or vary the written contract for the sale of the property, for there was no contract liability of the individual stockholders. They were liable, if at all, upon general principles which hold owners of unpaid stock for the obligations of the corporation to the extent of such unpaid stock.

The court say: "it is well settled by the most unquestionable authorities that proof is admissible of any collateral parol agreement, or independent fact, which does not interfere with the terms of the written contract, though it may relate to the same subject matter." The case in no wise supports defendant's case and is not in conflict with the rules we have stated.

The case of Lockwood vs. Caufield (20 Cal., 126), cited by defendant, is not in conflict with that rule. The court held that the testimony did not tend to contradict or vary the terms of the written instrument of assignment. They say, "the principle upon which the evidence was admitted rests upon an exception as well established as the rule itself," and further, that "the principle involved is the same as that which permits the introduction of similar evidence to prove that a deed, 251 absolute on its face, was intended as a mortgage." We shall not attempt to go further by way of comment on the cases cited by defendant.

It may be conceded that the general rule is that a defendant may show any matter which reduces, limits or defeats a recovery, by way of failure of consideration, total or partial, or that the contract has not been fully performed, or a breach of some stipulation of the contract, or warranty and breach, and misrepresentation and fraud at the inception of the contract. But nevertheless, where there is a written contract which purports to give the agreements of the parties, the rule is equally well settled that that is not only the best but the only evidence of the agreements of the parties. This rule is one "which is intended to give stability to the transactions of life, by enabling men to put their acts and agreements in form that shall be beyond the reach of the uncertainty incident to oral testimony, and would be of comparatively little value if witnesses could be called to prove that stipulations which have been omitted were notwithstanding meant to be as binding as if they had been set forth in terms." (2 Smith's Lead. Ca., 7 ed., p. 729.)

252 What right then has defendant to say that the contract of guaranty shall not be enforced according to its terms?

The only reason given is, that there was a contemporaneous oral agreement on the part of plaintiff which has not been kept. In other words, that he warranted there were 5,700,000 feet of timber on the contract lands, whereas there were but about one million feet, and that this amounts to failure of consideration.

There was not a total failure of consideration even under the claim of defendant as to what constitutes the consideration, because it is admitted by the pleadings that there were over a million feet of timber, and that all the timber has been cut and removed under the license given by plaintiff. There was then adequate consideration. There is no question of fraud in the case, and if the consideration for the guaranty was the timber which defendant expected to realize from the land, then at best the claim can be regarded as only a partial failure of consideration. But in our view the question is not one of partial failure of consideration. The consideration stated in the written contract for the guaranty is the license given by plaintiff to cut and remove the timber. On the contract thus made and its stipulations, plaintiff had a 253 right to rely. To permit parol evidence of warranty as to the quantity of timber to be shown and that such warranty constituted the consideration for the guaranty, would be to contradict and vary the terms written and signed by the parties. Defendant purchased the land contract from the Big Rapids Imp. & M'f'g Co.; all that the Mason Lumber Co. bargained for with plaintiff was to cut and remove timber from the lands.

For this license, according to the contract of guaranty, defendant promised to pay plaintiff the purchase price of the lands stipulated in the land contract. Plaintiff held as security for that purchase price the provision in the land contract against cutting and removing timber. This security he surrendered for defendant's guaranty.

All this is apparent from the face of the two written contracts. We hold therefore that nothing can be shown which contradicts the stipulated agreements of the parties, whether it touches the consideration or

otherwise, so long at least as the proposed evidence does not tend to show total failure. The license given by plaintiff in any event must be conceded to enter into the consideration for the guaranty; hence
254 again it is obvious there can be no claim of total failure of consideration.

Whether parol warranty could be shown for the purpose of establishing partial failure of consideration under a proper notice of that defence depends upon whether defendant can maintain a cross action for his damages on account of the alleged breach on the part of plaintiff. (Mumford vs. McPherson, 1 Wend., 414; Withers vs. Green, 9 How., 213.)

If defendant could maintain such cross action, then he is entitled to set up the warranty and breach, and recoup his damages in this suit. But upon the principle which we have stated, that to do so would contradict the written contract, we hold a cross action could not be maintained.

The motion is therefore denied.

THE UNITED STATES OF AMERICA,
Western District of Michigan, ss:

I, Chester B. Hinsdill, clerk of the circuit court of the United States for the sixth circuit and western district of Michigan, do hereby certify that the foregoing is a true copy of the records and files, and all of them, in the proceedings of said court in said entitled cause.

Witness my official signature and the seal of said court in Grand Rapids, this 27th day of September, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.] CHESTER B. HINSDILL,
Clerk.

(Indorsed:) U. S. cir. court, western district of Michigan. William Buchtel vs. Mason Lumber Co. Opinion and decision of the court on a motion for new trial. Withey, judge. Filed February 3, '77. C. B. Hinsdill, clerk.

(Indorsement on cover:) No. 274. The Mason Lumber Company, pl'ff in error, vs. William Buchtel. W. Michigan C. C. U. S. Filed 12th October, 1877.

OFFICE SUPREME COURT U.S.
FILED
APR 10 1880
D. W. MIDDLETON, Clerk.

SUPREME COURT of the UNITED STATES.

No. 274.

THE MASON LUMBER COMPANY,
Plaintiff in Error,
v.
WILLIAM BUCHTEL,
Defendant in Error.

In Error to the Circuit Court of the United States, for the Western District of Michigan.

STATEMENT OF CASE, ASSIGNMENT OF ERRORS,
—(AND)—
POINTS FOR PLAINTIFF IN ERROR.

EMERY A. STORRS,

Counsel for Plaintiff in Error.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET.
1880.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 273.

THE MASON LUMBER COMPANY, PLAINTIFF IN ERROR,

—VS.—

WILLIAM BUCHTEL, DEFENDANT IN ERROR.

STATEMENT OF CASE, ASSIGNMENT OF ERRORS,
—(AND)—
POINTS FOR PLAINTIFF IN ERROR.

EMERY A. STORRS,

Counsel for Plaintiff in Error.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET.
1880.

STATEMENT OF THE CASE.

On the 23d of September, 1874, Buchtel, the defendant in error, contracted to sell to the Big Rapids Improvement and Manufacturing Company, of Big Rapids, Michigan, 681 acres of pine lands, for the sum of $12,273.84, payable as follows: $3,068.46 on the 1st of the following January, and the balance in three equal annual installments from the date of the contract.

The contract prohibited the cutting or removal of timber without the written permission of Buchtel endorsed thereon.

The Big Rapids Company had contracted to cut and deliver to the Mason Lumber Company, the plaintiff in error, the timber on these and other lands, and on September 25, 1874, the contract was assigned in writing by the Improvement and Manufacturing Company to the Mason Lumber Company, which guaranteed the payments stipulated therein, which assignment was assented to in writing by Buchtel, who gave the Mason Lumber Company permission to cut and remove the timber.

It was further agreed between the parties that as fast as the timber was cut and removed from the lands, the purchase price should be due and payable. This assignment was intended merely to secure the Mason Lumber

Company for its guarantee, and it had no beneficial interest in the contract.

Suit was brought in the court below against the Mason Lumber Company for the first installment, and it plead that it was induced to enter into its undertaking by the false and fraudulent representation of the plaintiff, that the lands contained 5,700,000 feet of good merchantable pine timber, whereas, in truth and fact, they did not contain more than 1,500,000 feet, by reason whereof the defendant had sustained damages to the amount of $20,000, which it gave notice it should recoup.

The cause was referred by stipulation to a referee for trial, who settled a bill of exceptions of the proceedings on the trial, and made a written report, to which the defendant filed exceptions in writing in pursuance of the laws of Michigan, which, by the stipulation, was to govern the trial, and these exceptions were overruled by the court, and judgment entered for the plaintiff for $3,667.50, which is brought here for review.

The substantial question litigated was the fraudulent representation as to the quantity of timber on the lands.

The referee finds, as a matter of fact, that Mr. Bronson, who was the vice-president of the Big Rapids corporation, and represented it throughout the transaction, exhibited to Mr. Mason, of the Mason Lumber Company, in the presence and hearing of Buchtel, a plat of the lands, and represented that they contained 5,700,000 feet of pine timber, and that, as a matter of fact, there was only 1,237,199 feet of merchantable timber thereon.

He also finds that Buchtel had never seen the lands, and that all the knowledge he had of the quantity of timber was derived from an estimate furnished him by his grantor, showing that the land contained 3,900,000 feet.

His report expressly states that he does NOT find Buchtel's attention was called to the plat, or that he made any statements or representations to any of the parties in relation thereto, or the figures upon it, or the quantity of timber there represented to be on the lands.

Also, that he did NOT find that Bronson's representations to Mason, relative to the quantity of timber, were made in Buchtel's hearing.

As a matter of law the referee found, and in this he was sustained by the court, that it was immaterial whether the representations were true or false, or whether they had induced the defendant's guaranty or not, provided Buchtel was ignorant of their falsity, and was acting in good faith.

The leading question presented upon this record, therefore is, whether a *scienter* is an essential ingredient of a legal fraud.

Another question grows out of the expression "I do not find," frequently occurring in the report with reference to material facts. As for instance: "I do not find "that the representations of Bronson to said Mason, "relative to the quantity of timber on said lands, were "made in the hearing of said plaintiff." And the question is: Is not the report so incomplete upon these material facts, which should have been found positively one way or the other, as to amount to a mis-trial?

A motion was made to dismiss this case because the amount in controversy was less than $5,000, upon which the decision was reserved until the final hearing.

ASSIGNMENT OF ERRORS.

1st. That the referee erred, as did the court, in sustaining him, and overruling the defendant's exception in that behalf, in holding as a matter of law, that if Buchtel knew, during the negotiations, that the plat contained an estimate of 5,700,000 feet of pine timber on said lands, and the defendant was making a contract on that basis, that it did not matter unless he had within his own breast knowledge at that time that it contained a far less quantity.

Record, page 53.

2d. That the referee erred, as did the court, in sustaining him and overruling the defendant's exceptions in that behalf, in holding as a matter of law that under the facts found in the case, there was no such misrepresentation or suppression of facts known to the plaintiff relative to the quantity of timber on said lands made by said plaintiff, which amounted to a legal fraud upon the defendant in the premises, and avoided the assignment and guaranty.

Record, pp. 53 and 54.

3d. That the referee erred, as did the court, in sustaining him and overruling the defendant's exception in that behalf in holding that knowledge of the falsity of the representations made by the plaintiff was necessary to constitute a fraud.

4th. That the referee erred, as did the court, in sustaining him and overruling the defendant's exception in that behalf in holding that, as a matter of law upon the whole case, the plaintiff was entitled to judgment against the defendant.

Record, p. 54.

5th. That the referee has omitted to find upon facts in issue before him, and essential to support the judgment in this case, but, on the contrary, has expressly reported that he has not found these essential facts.

See 11th Finding of fact, Record, p. 48.
Also 6th " " " " " 52.

6th. That the referee erred, as did the court, in sustaining him and overruling the defendant's exception in that behalf, in refusing to allow the witness, L. G. Mason, to testify in behalf of the defendant what conversation between him and the plaintiff led him to remark to the plaintiff that the Big Rapids Company had a good thing in this contract; that they had a clear margin of quite an amount of money, although in his 11th finding of facts he relies on this conversation as evidence that the plaintiff was ignorant of the quantity of timber on the lands.

See pages 16, 17 and 49 of Record.

7th. That the referee erred, as did the court, in sustaining him and overruling the defendant's exception in that behalf, in refusing to allow the witness, Lyman G. Mason, to answer the following question:

Ques. State whether you would have made this contract, Exhibit B, (the guaranty sued on) for the Mason

Lumber Company, had it not been for the representations made by Mr. Buchtel as to the quantity of pine timber on Sections 8, 18 and 24, being 5,700,000 ft. ?

See page 25 of Record.

8th. That the referee erred, as did the court, in sustaining him and overruling the defendant's exception in that behalf, in refusing to allow Mr. Mason to answer the following question:

Ques. What was the inducement which caused the Mason Lumber Company to execute Exhibit B?

See page 25 of Record.

9th. That the court erred in overruling the several exceptions of the defendant to the referee's report, and entering judgment for the plaintiff.

LAWS OF MICHIGAN RELATIVE TO REFERENCE TRIALS.

The provisions of the statute of Michigan relating to trials before referees, which by the stipulations of the parties was to govern the trial of this cause, are contained in the second volume of the Compiled Laws of 1871, on pages 1682, 1683, and 1684; and so far as they are material to this case are as follows:

SECTION 5808. Issues joined in any civil action at law, whether of fact or of law, may upon the written consent of the parties filed with the clerk, or upon the oral consent in open court, be referred to such person, or such three persons as may be agreed upon by the parties, or appointed by the Court in case the parties fail to agree.

SECTION 5810. The trial by such referees shall be conducted in the same manner as a trial by the Court. They shall have the same power to administer oaths, to issue process, to compel the attendance of witnesses, to grant continuances, to preserve order or to punish all violations thereof; and if any witness shall fail to attend before such referee or referees, after being duly summoned or subpœnaed according to the practice of the Court, or being present shall refuse to be sworn or to testify, such referee or referees, if in term time, may certify the facts to the Court, or if in vacation to any Judge of the Circuit Court at chambers; and such Court or Judge may thereupon, if the facts certified shall appear to warrant it, punish such witness as for a contempt of Court, in the same manner as the Court could do if the witness had committed such contempt before such Court. When more than one is appointed, they must all meet to hear proofs and arguments, and to deliberate, but decision of the majority shall be regarded as their decision. The Circuit Judge may, by an order under his hand, filed with the clerk, discharge any referee on cause shown by affidavit, and may in like manner fill any vacancy that may occur in their number, or may direct the reference to proceed and be concluded without filling any such vacancy. He shall in like manner have power, on cause shown, to make an order for expediting the proceedings before referees, and to compel a report, or the signing of a bill of exceptions.

SECTION 5811. The referees shall report to the Court in writing, showing therein the facts found and the conclusions of law separately; and such report may be filed in term time or in vacation, and shall stand as the finding of the Court in term time unless excepted to, and judgment may be entered thereon in the same manner as if the action had been tried by the Court.

SECTION 5812. When the referees shall file their report, the clerk shall without delay give notice thereof in writing to the respective parties or their attorneys, in the manner provided for the services of notices in the Circuit Court, and immediately endorse on said report, under his hand, his certificate of the giving of such notice, and the time when the same was given, which certificate shall have the same effect as evidence as the return of service of an original writ by a sheriff. The other party within ten days after receiving such notice may file with the clerk exceptions in writing to any conclusions of law in such report, and shall serve a copy of such exceptions on the opposite party; and exceptions being filed and served as aforesaid, the case may be noticed for argument before the Court on such exceptions on any day in term, on the same notice as shall be requisite for special motions; but it shall not be necessary for the parties to file exceptions to the report in order to obtain a review of any ruling of the referees embodied in a bill of exceptions settled as provided by the next section.

SECTION 5813. Either party, on the hearing before the referees, shall be entitled to take exceptions to any ruling of the referees, in the same manner as on trial in open Court; and in case exceptions are so taken, the parties respectively shall be notified by the referees of the time and place when and where they will meet to complete their report, at which time they shall be informed of the conclusion of the referees; and the party so excepting may then, or previous to such time as the referees shall then adjourn to, prepare a bill of exceptions, which shall be settled by the referee on such adjourned day, and shall then be annexed to and filed with their report, and a review thereof may be had in the same manner as of exceptions to the report.

SECTION 5814. On the hearing of such bills of exception, or upon exceptions to the report, or both, the Circuit Court may confirm or set aside such report, in whole or in part, and in its discretion refer the cause back to the referees or enter judgment thereon; and in case that judgment shall be entered thereon, error may be brought on such judgment as in other cases — in which case the bill of exceptions, if any, the report, and the exceptions to the report, shall be considered as forming a part of the record in the case, and the finding of facts by the referees shall be treated as a special verdict.

POINTS.

I.

AS TO THE QUESTION OF JURISDICTION.

1. It must appear *affirmatively* from the record that the amount in dispute is below the jurisdictional sum; otherwise the damages claimed in the plea will be taken as indicating the amount.

Gray v. *Blanchard*, 97 U. S., 564.

2. The state of facts from which it appears that the amount in controversy exceeds the jurisdictional amount:

In July, 1874, the Big Rapids Improvement and Manufacturing Company, by Bronson, Vice-President, made the first purchase of the plaintiff of certain lands in Township 21, north of range 8 west, as appears in "Further Cross-examination of Buchtel."

Record, page 38, folio 110.

Which lands are described in a subsequent mortgage, which is set out in full, Exhibit G.

Record, page 57.

The deed of conveyance of those lands had been given without security at the time, for the payment of the purchase money. Plaintiff became uneasy, he wanted security, which led to an interview with Bronson at East

Saginaw, at which the following took place on September 23, 1874, as appears by plaintiff's testimony:

> "He (Bronson) said he understood that I was dissatisfied with the sale of lands I had made to him. I told him I was, and wanted him to secure me for those lands. He replied he would *if I would sell him these lands* on 21, 7, described in Exhibit A."

Record, page 30, folio 86.

The mortgage which plaintiff wanted is Exhibit G, and was then drafted, but Bronson would not sign it until the contract Exhibit A was drawn. Then when Exhibit A was drawn, "*he refused to sign it with the clause in it* "*prohibiting the cutting of timber.*" It was drawn up under my instructions.

Record, page 30, folios 86, 87.

Plaintiff and Bronson then went to Big Rapids, and on September 24, 1874, Bronson again wanted that clause stricken out. "*I told him no, unless he would secure me he* "*could cut no timber.*" He then wanted me to go with him to Muskegon and see Mason about a contract for logs—"*that Mason wanted to make a contract for logs.*"

Record, page 31, folio 88.

> "Before going to Muskegon, Bronson told me if I would go, maybe he could make arrangements to secure me, and I could give him permit to cut timber on the A lands."

Record, page 31, folio 88.

The plaintiff met Mason on September 25, 1874, at Muskegon, and then informed him of his business there.

> "I then stated to Mr. Mason that he perhaps was aware that I had sold to Bronson some lands, or the Improvement Co., and that he was anxious to cut them, and wished me to go down to see whether there

could be any arrangement made whereby *I could give him permission to cut.*"

Record, page 31, folio 89.

Plaintiff was already informed of a contract—or negotiations—between Bronson and Mason to cut this timber in Exhibit A, as early as September 22, 1874.

Record, page 33, folio 95.

And prior to this, on September 17, 1874, Bronson had concluded a contract with Mason "to sell, cut, haul "and deliver to the said Mason Lumber Company," the timber from these lands in Exhibit A.

Record, page 60, Exhibit F.
" " 61, folio 177.

Knowing of this contract, and contemplating inducing defendant by reason thereof, to guarantee the payments in Exhibit A, plaintiff, on September 24, 1874, at Big Rapids, before going to Muskegon, executed Exhibit A, *conditionally.* It was not considered to be completely executed "till we got through with Mr. Mason," and had succeeded in inducing the defendant to execute Exhibit B.

Record, pages 28 top, and 31, top.
See Exhibit A, Id., page 54, folio 162.

Plaintiff was seeking to induce the defendant to guarantee payment of *the entire consideration* of Exhibit A, *and not of one installment merely.*

In order to accomplish this, the plaintiff falsely represented to the defendant, as claimed by defendant's plea, notice and proofs, that the lands contained 5,700,000 feet of good, merchantable pine timber.

See plea and notice, Record, pages 8, 9.
Proof Id., page 16, folio 46.
Id., page 17, folios 49, 50.
Id., page 22, folios 62, 64.

The guarantee which the plaintiff thereby obtained from defendant is Exhibit B.

Record, page 56, folio 168.

And the defendant also took an assignment of Exhibit A.

That the representation was untrue in fact, to the knowledge of the plaintiff and Bronson. See

Record, page 40, folios 115, 116.

For the quantity of timber, which was 1,162,543 feet, on the lands in Exhibit A. See

Record, page 18, folio 50, at close.
Testimony of Tiffany, Id., page 29, folio 82.

The referee finds that there was cut and left standing in all, 1,237,199 feet.

Record, page 49, folio 144.

The entire shortage was about 4,537,457 feet.

Of the quantity represented to be on the land, 4,000,000 feet should have been No. 1 logs. The actual product of No. 1 logs was 815,000 feet, being a deficiency of 3,185,000 feet of No. 1 logs, of which the defendant lost the benefit—at least to the sum of $2.00 per thousand feet—amounting to $6,370.00.

Record, page 20, folios 56, 57.

The price at which plaintiff sold the lands in Exhibit A, with the supposed amount of 5,700,000 feet of good merchantable pine timber was $12,273.84, which is likewise evidence of the value of the timber at a little over $2.00 per thousand feet, showing defendant's damage on account of the deficiency, the same as above.

Thus the notice with the defendant's plea, which claimed $20,000 damages, and the proofs equally show an amount in controversy exceeding the jurisdictional amount of $5,000.00.

3. The plaintiff sues for a *single* installment of the consideration of Exhibit A, and counts upon defendant's guarantee of *the entire consideration.*

By the defense set up it appears that the guarantee was obtained by a false and fraudulent representation, which representation is an entire, indivisible thing, and the damages are entire.

As the plaintiff sues upon an entire thing to recover but a part of it, the defendant has a right to interpose a defense that goes to the entirety.

But the counsel for the defendant in error insists that defendant below cannot have a judgment for damages in excess of the installment sued on, and they rely on the Wisconsin cases cited in their brief, 42 Wis., pages 488 and 622.

Those, indeed, are cases of suit to recover an installment on a contract where the defense was misrepresentations, which affected the contract as an entirety. The neglect was in the trial court, which did not require a surrender of the outstanding notes as a condition of recovery. But that question was not in the record in error, and the court did not decide it. See close of the opinions, 42 Wis., pages 492 and 625.

By the modern law of recoupment in cases of fraudulent representations, where the contract cannot be rescinded *in toto* because of the property having perished or been appropriated before discovering the fraud, the contract is deemed to be *affirmed only for what it is worth.*

Withers v. *Green*, 9 How., 213.
Van Buren v. *Digges*, 11 Id., 461.

And in suit between the parties—the one for the price, the other for damages—their conflicting claims should be adjusted on equitable principles, to avoid circuity of action, and to do complete justice.

There is a natural equity, recognized by the civil law under the name of compensation, and incorporated into our modern law of recoupment, *especially as to claims arising out of the same transaction*, that one claim should compensate the other, and that *the balance only should be recovered.*

The Michigan statute of recoupment is founded in this manifest equity, and carries the remedy to the same extent as in the law of set-off, thereby making the defense of recoupment a counter suit to every intent and purpose.

The statute is as follows:

"(5802.) The People of the State of Michigan enact, That in any action in any court, if the defendant shall claim damages by way of recoupment by plea or otherwise, in pursuance of the rules and practice of such court, and on the trial of the issue formed, if the jury or court trying the same shall find such defendant entitled to an amount of damages, whether liquidated or not, greater than the amount of the demand of the plaintiff, the court shall give judgment according to the true right thereof for the defendant, for the amount of such excess so found and costs, and issue execution therefor against the plaintiff as in cases of judgment and execution on plea or notice of set-off."

The remedy upon such counter claim is not other or different than is presented by an independent suit. And the defense to such counter claim is the same in extent and effect as if presented in an independent suit.

Rawley v. *Woodruff*, 2 Lan., (N. Y.) 419.

Where the vendee, who has been induced to contract by the false and fraudulent representations of the other party, brings suit for the fraud and deceit, *the other party may recoup the unpaid price.*

Avery v. *Brown*, 31 Conn., 398.

On page 401, the court say:

"And so where the buyer, not having paid the purchase money, sues the seller upon his part of the contract regarding the quality or value of the property, the price of it remaining unpaid should in the same manner be deducted from the plaintiff's damages. Thus complete justice is effected in one suit, and without the expenses and delays of two.

"And the propriety of the application of the principle thus illustrated to a case where one of the parties has been induced by the fraudulent misrepresentations of the other to assume the obligation on which the suit is brought, is even more strikingly apparent."

So that the plaintiff below may abate, in whole or in part, the defendant's damages for the fraud, by recoupment on his part of the unpaid purchase money, and enable the court to "give judgment according to the true "right thereof" for the party justly entitled—as required by the statute of Michigan.

4. Buchtel afterwards began suit against the Lumber Company for the other installments due under the contract. That cause has been removed into this court, and is Number 274.

It appears from that record (pages 22–79) that the record and judgment in the first suit were introduced in evidence by the plaintiff as *res adjudicata* of the questions therein involved, and under the rulings of the court the defendant was prevented from making its defense on that trial on the ground of fraud.

The result of Buchtel's claims in the two suits, if allowed, is that the Lumber Company cannot recoup in the first its damages beyond his claim, because it has paid nothing, nor can it recoup at all in the second, because the first judgment is *res adjudicata,* while he is permitted to recover judgment for the *full* contract price.

5. A point is made that the counsel for the defendant below requested that a judgment of no cause of action be rendered, and it is claimed that this is a waiver of the right to recoup.

This request had no reference to the defense on the merits, but related solely to a contention before the referee that there could be no recovery, because the suit had been prematurely brought, also that there had been no notice of non-payment, and that there was a variance between pleadings and proofs.

Record, pages 50, 51 and 52.

Having disposed of this objection, the referee proceeds in his next finding to state and discuss the defense *on the merits.*

It clearly appears from his findings (page 52) that there were several points insisted on in the defense, aside from the question of fraud.

And that the request was intended to apply only to the points above mentioned.

II.

The contract sued upon was entered into by the plaintiffs in error, upon the representation of the defendant that there was 5,700,000 feet of timber upon the land.

This representation was false.

For the damages resulting from this misrepresentation, the defendant in error is liable, whether at the time they were made he knew them to be false or not.

The contract sued upon was induced by these representations, and the defendant in error cannot be excused on the ground that he injured the plaintiff in error by an unintentional untruth.

Smith v. *Richards*, 13 Peters, 36.
Warner v. *Daniels*, 1 Wood & M., 107.
Mason v. *Crosby*, 1 Wood & M., 356.
Smith v. *Babcock*, 2 Wood & M., 257–260.
Bebee v. *Young*, 14 Mich., 138.
Detroit v. *Webber*, 26 Mich., 288.
Tong v. *Marvin*, 15 Mich., 60.
Lockeridge v. *Foster*, 4 Scam., 573.
Patterson v. *Lyttle*, 1 Jones, Penn., 53.
Evans v. *Edmonds*, 13 C. B., 777.
Pidduck v. *Barker*, 3 B. C., 605.
Converse v. *Blumrick*, 14 Mich., 123.

A. THE FACTS ACTUALLY FOUND BY THE REFEREE BRING THE CASE CLEARLY WITHIN THE LEGAL PRINCIPLE STATED.

He finds, without qualification or reserve, the following facts:

1. That on the 25th day of September, 1874, the defendant in error, Mr. Mason, and Gen. Bronson went together to the office of the Mason Lumber Company.
   6th Finding, Record, p. 48.

2. "That such negotiations were then and there had between said Bronson, on behalf of the Big Rapids Improvement and Manufacturing Company, said Lyman G. Mason, on behalf of said Mason Lumber Company, and said plaintiff on his own behalf, as resulted in assignment of said Contract 'A,' by Big Rapids Improvement and Manufacturing Company to said Mason Lumber Company, the guaranty by said Mason Lumber Company of the payment to plaintiff of the several sums of money agreed to be paid to him by the provisions of said contract 'A.'"
   10th Finding, Record, p. 48.

3. *That during such negotiation* Bronson produced a plat of the lands, and on which were the figures 1,700, 1,800, 1,000 and 1,200, and represented the lands to contain 5,700,000 feet of pine timber.
   11th Finding, Record, p. 48.

4. That during such negotiation said plat was on the table in the presence of Mason, Bronson and Buchtel, and *was examined by Mason.*
   11th Finding, Record, p. 48.

5. That there were in fact on said lands in all only 1,237,199 feet of merchantable timber at the time said contract was executed.

   11th Finding, Record, p. 49.

B. THE LEGAL CONCLUSION REACHED BY THE REFEREE IS IN DIRECT CONFICT WITH THE PRINCIPLE STATED.

He says, (*6th Finding of Law*, Record, pp. 53 and 54):

> "I am of the opinion, therefore, under the facts found in this case, that there was no misrepresentation or suppression of facts *known to said plaintiff*, relative to the quantity of timber on said lands made by said plaintiff *which amounted to a legal fraud* upon said defendant, and avoided said assignment and guaranty."

Again, in the *sixth* finding of law, in referring to the representation made by the plaintiff as to the anxiety of Bronson and Eldred to buy the lands, he says:

> "Is this such a false representation, such a false suppression of facts *within the knowledge of the plaintiff*, as will avoid the guaranty on the ground of fraud?"

Again, in the same finding of law, after mixing in as a matter of fact that the estimates on the plat were originally 3,700,000 feet, he says:

> "If the plaintiff knew, during said negotiations, that Plat C contained an estimate of 5,700,000 feet of pine on said lands, and defendant was making a contract on such basis, *what does it matter unless he had within his own breast knowledge at that time that it contained a far less quantity? There is nothing in the case which shows that plaintiff had any such knowledge.* The estimate of quantity which Bentley had given him may not have been in his mind at that time. But if it was, was he *under any legal or moral obligation to communicate* to defendant, unasked, the opinion of Bentley in relation to the quantity?"

From these extracts from the report it is perfectly clear, that without attempting to determine the question whether the defendant in error did in fact make the representations alleged, or did remain silent when they were made, the referee considered those facts immaterial, because he holds that the simple consideration that if made, they were made in ignorance of the facts, relieves the plaintiff from all responsibility. In other words, the referee decides in practical effect that the defendant in error is not responsible for the damages which the plaintiff in error suffered by reason of those representations, not because he did not make them, but because they were not knowingly false.

This is not the law, and herein is the fatal error of the report.

C. THE DEFENDANT IN ERROR CANNOT ESCAPE RESPONSIBILITY FOR THE REPRESENTATIONS MADE AS TO THE QUANTITY OF TIMBER UPON THE LAND, ON THE ASSUMPTION THAT THEY WERE ACTUALLY MADE BY BRONSON.

Buchtel well knew that the Mason Lumber Company was under no obligation to guarantee the performance of contracts made by the Big Rapids Improvement and Manufacturing Company.

He knew that the sole consideration for that guaranty was the quantity of timber upon the land covered by the contract of that company with him.

He took part in the negotiations on "his own behalf."

Bronson and Buchtel were interested in a common purpose, to wit, to secure from the plaintiff in error the guaranty of the contract between them.

Buchtel reaped all the advantages and benefits resulting from the false representations made in his presence, and in his interest by Bronson, and must be held responsible for the consequences.

D. THE EFFORT OF THE REFEREE TO RELIEVE THE DEFENDANT IN ERROR FROM RESPONSIBILITY FOR THE FALSE REPRESENTATIONS WHICH INDUCED THE GUARANTY, ON THE SCORE OF BUCHTEL'S IGNORANCE, IS INCONSISTENT WITH THE FACTS AS ACTUALLY FOUND BY HIM.

The referee makes Buchtel a party to the contract, representing and acting for himself and on his own behalf, sets him in the same room and at the same table with Mason and Bronson, makes him a participant in all the negotiations and conversations which finally resulted in the contract, places the false and fraudulent plat on the table before him—finds that he sees it—and yet undertakes to screen him from responsibility by declaring that he does not find that he heard the conversation in which he took a part as an interested party, or that he knew what was on his own plat which laid before him, at which he looked, and the nature of which was made the subject of discussion in his presence, and in bringing about a contract which he, within an hour afterwards, on his own behalf executed.

The law will not permit ignorance so convenient, and blindness so accommodating as this, particularly where voluntary ignorance and blindness commands a premium to be paid by a party who knew what was going on about him and was sufficiently diligent to see and to know what was lying before his eyes.

These simple facts which the Referee has found, cannot be stripped of their legal attributes by a graciously given ignorance, deafness, dumbness and blindness. Buchtel was not speechless, for the Referee finds that he did say something; he was not altogether stolid in his ignorance, for he did know enough of what was transpiring in his presence to insist upon certain conditions in his contract, and to execute it when these conditions were inserted in it; he was not deaf, for the Referee finds that he did hear what Mason said to him. In short the Referee finds that he saw all that his own interest required him to see, he heard whenever and whatever his interests required him to hear, he could speak whenever speech could save him or make him a dollar. This pretended ignorance is a fraud and ought to be denounced as such.

Buchtel did his fair share of the talking, we may be assured. He heard all that Bronson said, we may be confident. His good motives, which the Referee conveniently finds, are too deep down in the heart for ordinary judicial agencies to reach. The law does not make the effort, but dispensing with a discussion dangerously metaphysical in its character, denounces the transaction as a legal fraud.

III.

THE FINDINGS ARE SO ENTIRELY INCONSISTENT THAT NO JUDGMENT BASED UPON THE REPORT CAN BE SUSTAINED.

1. The Referee finds that the defendant in error was present and took part in all the negotiations resulting in the contract.

YET

He distinctly finds that he made none of the representations on which the contract was based.

2. Finding that the defendant in error was present at and took part in the negotiations—finding that during those negotiations and as a part of them, Bronson represented that there were 5,700,000 feet of timber on the land;

YET

He says he does not find that those representations, made in defendant in error's *presence*, were made in his *hearing*.

3. He finds that the plat was on the table in defendant in error's presence during the negotiations—used as a part of those negotiations—that he saw the plat—

YET

He says he does not find that the defendant in error knew what was the character of the plat exhibited, discussed and examined in his presence and hearing.

It is impossible that Buchtel should have been present at the negotiations, acting for himself, and not have known in what those negotiations consisted.

It is impossible that Bronson should, as a part of those negotiations to which Buchtel was a party, have made representations in his *presence* and not in his *hearing*.

It is impossible that a plat should have been exhibited, examined and discussed in his presence, without his knowing what the plat represented.

Being a party to the contracts in which those negotiations resulted, the law conclusively presumes:

That he knew what the negotiations were.

The law conclusively presumes that he heard representations made in his presence and in his interest, and on thestrength of which the contracts were made, and the benefit of which he has reaped.

The law conclusively presumes that he was cognizant of the nature and character of documents exhibited and discussed in his presence, and on which he as well as the other parties to the negotiations acted.

The declaration of a referee that he does not find that he heard and saw what the law made it his duty to hear and see, is a legal absurdity closely bordering on dishonesty, and will not be tolerated.

Buchtel had no right to stop his own ears so that he should not hear, nor close his own eyes so that he could not see.

What the law would not permit Buchtel to do for himself, it will not permit a super-serviceable and too willing referee to do for him.

Even then, if it be assumed that the report in declaring "I do not find" certain facts is to be treated as equivalent to saying "I do find those facts do not exist," it cannot be sustained, for the manifest reason that a party to a contract, present and participating in the negotiations which led to it, is bound to heed, to hear and know what those negotiations were, and is therefore conclusively presumed to have heard and known them.

IV.

But the expression "I do not find," etc., is not to be construed as a finding of the opposite.

1. This is apparent from the situation in which Buchtel is placed as an active participant in the negotiations which ripened into the execution of the contracts to which he was a party.

2. It is apparent from the extracts from his report which I have already quoted, which expressly treats the questions as to whether Buchtel made the representations or heard them made and assented to them, as open questions left in doubt, which the referee did not undertake to decide, because he did not consider their decision necessary.

To all of which our answer is:

That being present at, and having had full and complete opportunities for hearing all the negotiations and representations, out of which the contracts to which he was a party grew, the law will not suffer him to thus voluntarily remain ignorant, to the damage of innocent parties with whom he was contracting.

V.

If these findings in their present shape are all taken together to be treated as leaving the question whether Buchtel made or assented to these representations undisposed of and undetermined, then the judgment cannot stand, for until those questions are decided one way or the other, there can be no basis upon which to rest a legal conclusion. A failure by a referee to find one way or the other a material fact, is a fatal objection.

Meacham v. *Burke*, 54 N. Y., 217.
Buntin v. *Rose*, 16 Ind., 209.
The People v. *Wells*, 8 Mich., 104.
Carroll v. *G. T. R. R.*, 19 Mich., 94.
Buckley v. *G. W. R. W. Co.*, 18 Mich., 127.
Crane v. *Reeder*, 25 Mich., 313.
Harbaugh v. *Cicott*, 33 " 246.

VI.

But the Referee does expressly find that the plat exhibited belonged to the plaintiff; that it originally contained estimates of the quantity of timber on the land, far in excess of the real quantity, to wit: 3,700,000 feet. It is not pretended that Buchtel did not know that the plat exhibited was the one delivered by him to Miller — and yet he at no time made even a pretense, or a hint that the estimates as then exhibited were larger than the original ones by 2,000,000 feet. This much of information he certainly possessed, and this he did not communicate. This was a fraud.

The rule is well settled, both as to the findings of a Referee and as to special verdicts, that nothing should be left for inference.

Where the question is as to the effect of a judgment as an estoppel, the rule is well settled, that upon the point upon which the estoppel is claimed, THE CONCLUSION MUST BE INEVITABLE, that the precise point has actually been determined.

Freeman on Judg't, p. 223.
Burton v. *Shannon*, 99 Mass., 203.

It is hardly possible to say that the conclusion from this Report, that the Referee found that Buchtel neither made, nor heard, nor assented to the representations as to the quantity of timber on the land, is an inevitable one. He does not so state, and such conclusion is merely an INFERENCE from the expression " I do not find."

In *Wheeler* v. *Hibbard*, 20 John., 294, the Court say, " The principle is sound that the Court can INTEND noth-" ing in a special verdict but what is found by the jury," and in *People* v. *Wells*, 8 Mich., 104, it held that " The " Court can add nothing to a special finding or infer any " facts which the jury have not inferred and set forth."

In *Buckley* v. *Gt. Western R. W. Co.*, 18 Mich., 127, the Court say, speaking of a special verdict : " We are " not permitted to assume any facts not therein stated, or " to infer any from those found."

The findings should be so certain, that there is no room for discussion concerning them, and in this case the Referee expressly declares that it was unnecessary in his view of the law, that he should find those particular facts one way or the other.

I submit herewith an analysis of the facts found and not found.

Respectfully submitted.

EMERY A. STORRS,

Counsel for Plaintiff in Error.

THE FINDINGS.

I annex copies from the Referee's Report—so much of the facts found, and the facts not found, as I have deemed it necessary to discuss on the argument of this motion.

FACTS FOUND.—FINDINGS OF FACT.

10th Finding of Fact.

That between 9 and 10 o'clock, A. M., of that day, the plaintiff and said Bronson went to the office of said Mason Lumber Company, and that such negotiations were then and there had between said Bronson, on behalf of said Big Rapids Improvement and Manufacturing Company, said Lyman G. Mason, on behalf of said Mason Lumber Company, and said plaintiff, on his own behalf, as resulted in the assignment of said contract "*A*," by said Big Rapids Improvement and Manufacturing Company to said Mason Lumber Company, the guaranty by said Mason Lumber Company of the payment to plaintiff of the several sums of money agreed to be paid to him by the provisions of said contract "*A*," and in permission on the part of said plaintiff to cut the timber from the lands described in said contract, by the execution by said corporations of exhibit "*B*," which is hereto attached, and is hereby made a part of my findings of fact in this case.

Record, page 48.

11th Finding of Fact.

That during such negotiations, the said Stephen Bronson produced a plat of the township in which said lands described in contract "*A*" were situated, which said lands were represented by yellow and red colors on said plat, upon or near to which said colors are the figures 1,700, 1,800, 1,000 1,200.

That said Bronson represented said lands to contain 5,700,000 feet of pine timber.

* * * * * * * *

I find that at that time said plaintiff had never seen said lands, and that said Mason Lumber Company was aware of that fact, by a communication then made of that fact by said plaintiff to its said president. That all the knowledge which said plaintiff had of the quantity of timber on said lands at the time of the execution of exhibit "*B*," was an estimate furnished him by his grantee (one Bentley), at the time said plaintiff purchased said lands, which said estimate was 3,700,000 feet.

* * * * * * * *

That during such negotiations, said plat was on the table in the presence of said Lyman G. Mason (President of said Mason Lumber Company), and in presence of the plaintiff and said Bronson, and was examined by said Mason.

* * * * * * * *

I do find that the plat so produced by said Bronson at said negotiations was a plat delivered to one Miller, by said plaintiff, about one year and a half before that time, and that it has not been in plaintiff's possession since such delivery. That at the time of such delivery, the estimates of said Bentley, before referred to, were marked on said lands on said plat. That said plaintiff never changed the same, or authorized any change thereof, and had not before seen said plat since its delivery to Miller.

I do find, however, that at or about the execution of said exhibit "*B*," said Mason remarked to said plaintiff, substantially, that if the timber was there (meaning on the lands), it was all right, and the Big Rapids Improvement and Manufacturing Company had a good thing. To which said plaintiff replied, that, judging from Eldred and Bronson's anxiety to get the lands, it must be all right, but that he had never seen said lands.

Record, pages 48 and 49.

FACTS FOUND IN FINDINGS OF LAW.

6th Finding of Law.

He (plaintiff), entered into contract "*A*," for the sale of the lands without warranty as to quantity or quality of timber thereon. No question is raised of that kind. No mention is made of the quantity of pine on the lands, in the written agreement containing the guaranty.

I have found as a fact, however, that Bronson, Vice-President of the Big Rapids Improvement and Manufacturing Company, produced plat "*C*," and that the same was examined by the president of the defendant, during the negotiations out of which said guaranty and assignment grew, and that it lay on the table in the presence of said Bronson, Mason (President of defendant), and plaintiff, but that plaintiff's attention was not called to said plat, or the figures thereon.

I have also found as a fact that after the terms of said assignment and contract of guaranty had been agreed upon and settled, and about the time of the execution thereof, said Mason (President of said defendant) remarked to said plaintiff, "If the timber is there it is all right and The Big Rapids Improvement and Manufacturing Company has a good thing," and that said plaintiff replied, "judging from the anxiety of Bronson and Eldred to purchase it, I suppose it is all right; I have never seen the land."

Is this such a false representation or such a false suppression of facts within the knowledge of plaintiff as will avoid the guaranty, on the ground of fraud?

Plat "*C*" was a plat which had belonged to said plaintiff, it is true, one year and a half before that time. At that time he had parted with the possession of it and had not seen it since.

When it went into the possession of Miller at that time, it had on it the estimates of Bentley of the quantity of pine on said lands, viz: 3,700,000 feet.

Plaintiff had made no estimate himself on it, and he had no knowledge on which to base an estimate.

If the plaintiff knew during said negotiations that plat "*C*" then contained an estimate of 5,700,000 feet of pine on said lands, and defendant was making a contract on such basis, what does it matter, unless he had within his own breast knowledge at that time that it contained a far less quantity?

There is nothing in the case which shows that plaintiff had any such knowledge.

The estimate of quantity which Bentley had given him may not have been in his own mind at that time.

But if it was, was he under any legal or moral obligation to communicate to defendant, unasked, the opinion of Bentley in relation to the quantity ?

The reply of plaintiff to the remark of the President of defendant, that he thought it was a good thing, judging from the anxiety of Eldred and Bronson to purchase the lands indicated to the President, it seems to me, that the plaintiff was not then acting upon any knowledge he had himself of the amount of timber thereon.

I am of the opinion therefore, under the facts found in this case, that there was no misrepresentation or suppression of facts known to said plaintiff, relative to the quantity of timber on said lands made by said plaintiff, which amounted to a legal fraud upon said defendant in the premises, and avoided said assignment and guaranty.

Record, pages 53 & 54.

FACTS NOT FOUND IN THE FINDINGS OF FACT.

11th Finding of Fact:

But I do not find that said plaintiff made any representations whatever in relation to the quantity of timber on said lands, or that he had any knowledge of the quantity of timber thereon at the time of the execution of exhibit "*B*."

* * * * * * *

But I do not find that such estimate was before him at that time, or that he made any representation in relation thereto.

* * * * * * *

But I do not find that plaintiff's attention was called to the same by either Mason or Bronson, or that plaintiff made any statements or representations to any of the parties present in relation thereto or the figures upon it, or to the quantity of timber then represented to be upon said lands.

* * * * * * *

I do not find that Miller was the agent of said plaintiff for any purpose whatever; neither do I find that the representations of Bronson to said Mason relative to the quantity of timber on said lands, were made in the hearing of said plaintiff.

FACTS NOT FOUND IN FINDINGS OF LAW.

6th Finding of Law:

But I do not find that said plaintiff had any actual knowledge of the quantity of pine on said lands at that time, or that he had ever had any knowledge of the quantity thereon, except on estimate of the same, made by one Bentley for his grantor, furnished him at the time he purchased said lands several years before, which estimate placed the amount at 3,700,000 feet.

I do not find that said plaintiff made any representations at the time said contract of guaranty was entered into, or at any other time, as an inducement thereto, or for any other purpose to said defendant, relating to the quantity of pine on said lands.

Record, page 53.

PHILADELP
BAR
ASSOCIATIO

OFFICE SUPREME COURT U. S.
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SUPREME COURT of the UNITED STATES.

No. 274.

THE MASON LUMBER COMPANY,
Plaintiff in Error,
v.
WILLIAM BUCHTEL,
Defendant in Error.

In Error to the Circuit
Court of the United
States, for the Western
District of Michigan.

STATEMENT OF CASE, ASSIGNMENT OF ERRORS,
—(AND)—
POINTS FOR PLAINTIFF IN ERROR.

EMERY A. STORRS,

Counsel for Plaintiff in Error.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET.
1880.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 274.

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—VS.—

WILLIAM BUCHTEL, DEFENDANT IN ERROR.

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STATEMENT OF THE CASE.

On the 23d day of September, 1874, the defendant in error contracted in writing to sell to the Big Rapids Improvement and Manufacturing Company, a corporation doing business at Big Rapids, Michigan, of which Stephen Bronson was vice-president and agent, eight descriptions of land, comprising $681\frac{85}{100}$ acres, and to give conveyance after full payment of the purchase price. The Big Rapids Improvement and Manufacturing Company agreed to pay therefor $12,273.84 as follows: $3,068.46 January 1st, 1875, with interest, and the balance in three equal annual installments, the first thereof on the 23d day of September, 1875, with interest.

To this contract the defendant in error was a party of the first part, and the contract contained, among others, this stipulation: "No timber is to be cut or removed "from said land without the written permission of the first "party endorsed on this contract."

It appeared from the evidence in the case that the object of the purchase was mainly the timber supposed to be on the land. On the 25th of September, two days after the date and execution of this contract, Bronson and Buchtel went to Muskegon, Michigan, the residence of Lyman G. Mason, and by appointment met Mason at the office of the Mason Lumber Company, and entered into negotiations which ripened into the execution of a guarantee, a copy of which is hereafter given.

During the course of these negotiations, the quantity of timber upon the land was fully discussed, and a plat was exhibited, which is annexed to the contract, showing by figures upon the various pieces of land the amount of timber thereon. These negotiations ripened into an assignment of that contract to the Mason Lumber Company, the plaintiff in error, which is a corporation doing business at Muskegon. Whereupon the Mason Lumber Company, by its president and agent, Lyman G. Mason, guaranteed the payment of the purchase money by an instrument in writing, signed by all the parties, and of which the following is a copy:

"MUSKEGON, Mich., September 25, 1874.

"In consideration of the sum of one dollar, the receipt "of which is hereby acknowledged by the Big Rapids "Improvement and Manufacturing Company, and for "other valuable considerations, the Big Rapids Improve-"ment and Manufacturing Company hereby assign the "contract hereto attached, of date September 25th, 1874, "between William Buchtel, of Akron, Ohio, and said Big "Rapids Improvement and Manufacturing Company, the "said Buchtel hereby assenting to this assignment, with "the understanding that said Mason Lumber Company "hereby guarantees the payments as stipulated in said "contract, upon which guarantee permission is hereby "given to enter upon, cut, and remove the timber upon "the lands embraced in said contract hereto attached; it "being understood that as fast as the timber is cut and "removed from said land, or any part thereof, the pur-"chase price shall be due and payable; that is to say, for "all said land which may be cut before the 23d day of "September, 1875, the full purchase price shall be paid on "that day."

This suit was brought upon this guarantee for the three last payments due under the contract. The pleadings set forth the contract.

The defendant pleaded the general issue, and gave notice that it would give in evidence on the trial that at the time and place of making the undertakings and promises set forth in the declaration, the plaintiff therein represented, undertook, and promised that the lands mentioned and described in the declaration then contained and would yield 5,700,000 feet, board measure, of good merchantable pine timber; that by reason of said representations the defendant below, confiding therein, was induced to, and did take and receive from the Big Rapids Improvement and Manufacturing Company, the assignment of its interest in that contract; that said representations were false and fraudulent, and that the lands contained and would yield only 1,500,000 feet, board measure, of such pine timber.

The defendant below also gave notice that it would prove upon the trial that at the time and place of making the guarantee set forth in the declaration, the plaintiff therein and one Stephen Bronson, who was then and there vice-president of the Big Rapids Improvement and Manufacturing Company, acting in concert, and with a common object, to induce said defendants to make said alleged guarantee for the benefit of said plaintiff therein, did, as the inducement thereof, then and there represent, undertake, and promise the said Mason Lumber Company that the said lands mentioned and described in said declaration contained and would yield 5,700,000 feet, board measure, of good merchantable pine timber; that in pursuance of said common object, and as a further inducement, Bronson and Buchtel did then and there produce a certain plat of said lands belonging to the plaintiff, and Bronson, in the presence and hearing, and with the acquiescence of said plaintiff, exhibited to the defendant a plat of said lands, upon which there was marked, directly under said section 8, the figures 1800, which said Bronson then and there represented meant that there was 1,800,000 feet, board measure, of the pine timber aforesaid, standing and being upon said section; that under section 18 the figures 1700 appeared; on the west half of the south-west quarter of section 24, the figures 1000; on the west half of the north-west quarter, the south-east quarter of the north-west quarter, and the south-west quarter of the north-east quarter of said section 24, the figures 1200, which Bronson declared to said defendant meant that there was respectively 1,700,000, 1,000,000, and 1,200,000 feet of merchantable pine timber standing on said pieces of land. That said declarations were made in pursuance of a common object, with the acquiescence of the plaintiff and in his hearing; that relying upon and believing the same, the defendant was induced to, and did make, the guarantee mentioned and set forth in said declaration; that said declarations, undertakings, and promises were untrue; that said land did not contain, and would not yield, 5,700,000 feet, board measure, but contained, and would yield, only 1,100,000 feet of such pine timber.

The notice also specifically sets forth the falsity of the statements with regard to the particular sections, avers the damages sustained, and offers to recoup the same.

The notice also sets forth a warranty by the plaintiff below, which formed the inducement of the guarantee, and the consideration upon which it was made; that there was at the time said contract was made contained upon said lands, and that they would yield 5,700,000 feet, which representations, it is averred in said notice, were untrue in every particular; that the warranties are broken, and that the defendant below sustained damages by reason thereof to the amount of $20,000, which they offer to recoup.

On this state of pleadings, the cause coming on for trial before his Honor, Judge WITHEY, and a jury, the plaintiff below offered and read in evidence the contract, together with the guarantee, and also a written stipulation that all the timber had been cut.

The plaintiff also offered, under objections of the counsel for the defendant below, the files and records in a previous suit (number 273 on this docket) between the same parties for the first installment of the moneys to be paid under the contract on the 23d day of September, 1874, consisting of the declaration, plea, stipulation to refer, order of reference, bill of exceptions settled by the referee, referee's report, exceptions to referee's report, order overruling exceptions, and judgment in favor of the plaintiff against the defendant.

The report of the referee is the same commented upon in Number 273 on this docket, and the pleadings in that case by the defense, besides the general issue, set forth merely that the representations made as to the quantity of timber upon the land were false and fraudulent.

It was contended by the counsel for the plaintiff below that the report of the referee and the judgment thereon was conclusive against the defendant below, and that the defendant was estopped from offering any evidence in support of its plea and notice, by reason of the finding of the referee and his judgment thereon.

The court below held the defendant estopped from showing that the representations by which the Mason Lumber Company was induced to execute the guarantee were fraudulent; but also ruled that the referee's report and judgment thereon was not conclusive as to the question of warranty or consideration.

On the trial below, the defendant below sought to show by the testimony of Stephen Bronson and Lyman G. Mason, the representations made by Bronson and by Buchtel at the time the guarantee was entered into, for the purpose of showing the warranty, and for the purpose also of showing the failure of consideration in the excution of the guarantee sued upon; all which evidence so offered was excluded by the court, on the ground that the evidence offered tended to contradict a written instrument by parol, to which ruling of the court counsel for the defendant below excepted.

The defendant below also offered to show that the plat which was produced during the negotiations, which resulted in the guarantee sued upon, was copied and annexed by the president of the plaintiff in error to the contracts at that time, as making a part thereof, and in the presence of Buchtel; and also offered to show what the figures upon the sections of land covered by the contract referred to, and to explain their meaning; all of which evidence the court excluded, on the ground hereinbefore stated, to which ruling of the court the defendant below excepted.

The court thereupon instructed the jury to render a verdict for the defendant, which was done accordingly; and after the argument on motion for new trial, judgment was entered upon the verdict, exceptions being duly taken, and the case comes to this court by writ of error.

ASSIGNMENTS OF ERROR.

1. That the court erred in permitting the record in the previous case to be read in evidence.

2. That the court erred in refusing to allow the defendant to introduce evidence tending to show that the plaintiff had induced it to execute the guaranty sued upon by falsely and fraudulently representing that the lands contained 5,700,000 feet of pine timber, when in truth and fact they only contained about 1,200,000 feet.

3. That the court erred in refusing to allow the defendant to show by parol that the plaintiff had warranted that there was on the lands 5,700,000 feet of pine timber, and that the warranty was broken because the land only contained about 1,200,000 feet.

3. That the court erred in refusing to allow the defendant below to show by parol that the consideration of its guaranty was the warranty on the part of the plaintiff that the lands contained 5,700,000 feet of pine timber, and that they contained only about 1,200,000 feet, by reason whereof there had been a failure of consideration.

4. That the court erred in refusing to allow the plat to be introduced in evidence, and also the offer to show by the witness, Bronson, that the plat belonged to the plaintiff below, and that it was exhibited by the witness and plaintiff to the defendant, and used by them for the purpose of showing the defendant the quantity of timber on the land, and that the plaintiff then and there represented the plat and the representations upon the plat to be true.

5. That the court erred in refusing to allow the defendant below to show, by the witness, Bronson, that the figures on the plat indicated the quantity of timber upon the various sections upon which these figures were, and the number of feet the different figures stood for.

6. That the court erred in refusing to allow the defendant to introduce in evidence a copy of the plat in question, annexed to the defendant's copy of the land contract, and the guaranty upon which the suit was brought, and to show by the witness Bronson, that a copy of this plat was made by Mr. Mason, representing the defendant during those negotiations in the presence of the plaintiff, and by Mr. Mason, annexed to his copy as forming a part of it, also in the presence of the plaintiff.

7. That the court erred in refusing to allow the witness, Bronson, to testify that Mr. Mason, in the presence of Buchtel and Bronson, and before executing the guaranty, made and submitted to Buchtel and Bronson, estimates of the value of the timber, and for the purpose of determining whether the defendant would execute the guaranty or not.

8. That the court erred in refusing to allow the witness, Bronson, to testify that during these negotiations Mr. Buchtel represented to Mr. Mason that there was upon the land in controversy 5,700,000 feet of merchantable pine timber, and that these representations were made as an inducement to the defendant to execute the guaranty.

9. That the court erred in refusing to allow the defendant to prove by Mr. Bronson that he and Buchtel went to Muskegon for the express purpose of securing the guaranty from the defendant, and that all the representations and assurances made by him to the defendant were made in the presence and hearing of Mr. Buchtel, and with his acquiescence and assent; also that he (Bronson)

knew nothing of his personal knowledge at that time as to the quantity of timber on the land.

10. That the court erred in refusing to allow the defendant to show, by Mr. Mason, the making of this plat, and that the representations were the moving inducement to the guaranty, and that Mr. Mason himself made the plat and attached it, and that there was upon this land, at the time the contract was entered into, about 800,000 feet of lumber.

11. That the court erred in refusing to allow Mr. Bronson to testify that the plat was used by Buchtel and Bronson pending those negotiations, for the purpose of arriving at the fact as to the amount of timber upon the land, and that it was taken by Bronson after the contract was concluded, with the consent of Buchtel, and has since that time been demanded by the plaintiff from Bronson, as his own property.

12. That the court erred in instructing the jury to render a verdict in favor of the plaintiff, and against the defendant.

POINTS.

I.

Should this Court reverse the judgment entered upon the report of the referee in number 273, on the ground that the facts actually found by him did constitute a fraud in law, then the judgment in the present case must also be reversed, for the reason, if for no other, that upon the trial we were not permitted to go into the question of fraud, because the report of the referee and the judgment thereupon were held to be conclusive against us.

If that judgment is now held to be erroneous, it certainly cannot now be conclusive.

II.

But in the present case the pleadings presented two grounds of defense not raised by the pleadings, nor found by the referee upon the former trial.

1. That the representations as to the quantity of timber upon the land amounted to a warranty, upon breach of which the plaintiff in error would be entitled to recoup the damages sustained.

3. That the consideration for the quantity sued upon, was the quantity of timber upon the land, and that the proof showed a failure of consideration.

The court below held the former judgment not to be conclusive on these points, but refused to permit us to give evidence upon them, on the ground that thereby a written instrument would be contradicted by parol.

III.

We insist that the evidence offered was competent and admissible upon the following grounds:

1. The contract of warranty need not be reduced to writing, but may rest in parol, and its existence shown by parol.

It furnishes the basis of a separate and independent action. Proving it, in no way alters, varies, modifies, enlarges or contradicts the guaranty.

The warranty of property sold is almost necessarily contemporaneous with the contract of sale.

It is not a *part* of the contract of sale; and in this case the warranty of the quantity of timber upon the land was not a *part* of the contract of guaranty, for the payment of the purchase price of the land.

They might have been included in the same written instrument, or in different ones. Under the statute of frauds the guaranty must be in writing — the warranty need not be. To this point are the following authorities:

Hahn v. *Doolittle*, 18 Wis., 196.
Herson v. *Henderson*, 1 Foster (N. H.), 224.
Wood v. *Ashe*, 3 Shobhart (S. C.), 64.
Creamer v. *Stephenson*, 15 Md., 211.
Weaver v. *Wood*, 9 Barr., 220.
Campbell v. *McClennachen*, 6 S. & R., 171.
Powelton v. *McShain*, 75 Penn. State, 238.
Shugardt v. *Moore*, 78 " " 469.
Taylor v. *Preston*, 79 " " 436.
Holmes' Appeal, 79 " " 289.
Taylor v. *Galland*, 3 Green, Iowa, 22.
Knight v. *Knight*, 28 Geo., 165.
Miller v. *Tuhthorne*, 31 Penn. State, 252.
Frey v. *Vanderhoff*, 15 Wis., 397.

Fiske v. *McGregory*, 34 N. H., 414.
1 Gr. Ev., Sec. 234 a 288 or a.
R. & B. R. R. Co. v. *Croker*, 29 Vt., 540.
Cornell v. *Todd*, 2 Denio, 130.
Bell v. *Brown*, 1 How., 169.
Lee v. *Dick*, 10 Pet., 482.
Dewolf v. *Raband*, 4 Pet., 476.
2 Phil. on Ev., 721.

2. The evidence offered is admissible in another view, namely, TO SHOW THE CONSIDERATION UPON WHICH THE GUARANTY WAS MADE, AND THAT THERE HAS BEEN A FAILURE OF SUCH CONSIDERATION.

In this connection the real question is:

Can the consideration on which a guaranty is made be shown by parol where the guaranty is in writing, and does not profess to express the entire consideration upon which it is based?

Suppose that the defendant in error had represented that the maker of a certain note which he held was perfectly solvent, and was the owner of ten million feet of logs, and on those representations, had induced the plaintiff in error to guarantee the payment of the note?

The guaranty is necessarily in writing.

The representation upon which it was made is not in writing.

Is it possible that those representations could not be shown by parol, and when shown to be untrue, would they not constitute a perfect defense to a suit upon the guaranty, and that too entirely irrespective of the question as to whether they were knowingly false or not?

No case has been found to the contrary.

The authorities on this branch of the question are numerous and decisive. See

Campbell v. *McClenachan*, 6 Serg. & Rawle, 172.
Powelton Coal Co. v. *McShain*, 17 Penn. State, 245.
Frey v. *Vanderhoff*, 15 Wisconsin, 401.
Knight v. *Knight*, 28 Georgia, 167.
Creamer v. *Stephenson*, 15 Md., 222.
Brown v. *Lunt*, 37 Maine, 434.
Nickerson v. *Saunders*, 36 Maine, 413.
Hahn v. *Doolittle*, 18 Wisconsin, 198.
Abbott v. *Marshall*, 48 Maine, 53.
Hersey v. *Verrill*, 39 Maine, 270.
Preble v. *Baldwin*, 6 Cushing, 566.
Weaver v. *Wood*, 9 Penn. State, 221.
Shughart v. *Moore*, 78 Penn. State, 472.
Holmes' Appeal, 79 Penn. State, 289.
Rey v. *Simpson*, 22 Howard, 342.
Lockwood v. *Canfield*, 20 Cal., 130.
Randall v. *Turner*, 17 Ohio State, 262.
Crossman v. *Fuller*, 17 Pick., 171.
Buzzell v. *Willard*, 44 Vermont, 44.
Basher v. *Forbes*, 36 Maryland, 154.
Pope v. *Water Power Co.*, 52 Maine, 535.
Smith v. *Childress*, 22 Ark., 330.
Clarke v. *Scott*, 45 California, 88.
McRea v. *Parmort*, 16 Wend., 460.
2 Phillips' Ev., 4th Ed. Cow. & Hills Notes, 655.

IV.

THE PLAT, SHOWING THE LOCATION OF THE LANDS, WITH FIGURES, INDICATING THE QUANTITY OF TIMBER ON EACH SECTION, WHICH WAS REFERRED TO DURING THE NEGOTIATIONS, AND ANNEXED TO THE CONTRACT, WAS CLEARLY COMPETENT, AND IT WAS ERROR TO EXCLUDE IT.

The report of the referee which was in evidence in the case, shows that during the negotiations which preceded the execution of the contract, there was exhibited and discussed a certain plat of the lands in question, belonging to Buchtel, and on which were figures indicating the quantity of timber on each particular section, and amounting in the aggregate to 5,700,000 feet. On the trial the plaintiff in error offered to show that the figures upon the plat indicated were intended to indicate the quantity of timber upon the land, that those figures were so understood by all the parties, that Mason, in Buchtel's presence, made a copy of this plat, and annexed it in his presence to the contract and guaranty which were retained by the Lumber Company. That the plat was the property of Buchtel admits of no question; that it was produced and used in his presence is equally clear from the facts found by the referee. The figures upon the plat were *written representations* as to the quantity of timber upon the land, and it is not essential, to give to such written representations force and efficacy as such, that they should be signed by the defendant in error.

The question is not one arising under the Statute of Frauds, and the signature of the party is not therefore essential.

If, for example, pending those negotiations, Buchtel had written out an explicit statement that there was upon the land 5,700,000 feet of merchantable pine timber, and had delivered such written statement to Mason, unsigned, could it be contended that such a statement would be incompetent, and that the writing would be inadmissible to prove itself? Moreover, entirely regardless of the question as to who wrote such statement, let us suppose that Buchtel had delivered to Mason a paper written by some third person, representing that there were 5,700,000 feet of pine timber upon the land, the mere fact that a paper had been thus delivered, would have made the representations which it contained, the representations of Buchtel; the act of delivery would constitute an adoption of them, as the representations would be in writing, and whatever effect they might have upon the written instrument of guaranty, such effect would not be produced by parol. We would not, in such a case, be proving a warranty by parol, but by writing.

Carrying these illustrations still further, let us suppose that such a paper had been delivered to Mason, and had been lost. After proving the loss, its contents could have been shown by parol. In the present case, however, we offered to show the plat was copied by Mason, and attached to the duplicate of the contract in the presence of Buchtel, and as forming a part of the entire agreement between them.

In that shape we offered it in evidence to the jury, and sought by parol to give a meaning to the figures upon the land covered by the contract, in connection with proof of the same character furnished by the referee's report.

More than all this, we offered in evidence to the jury the *identical plat* referred to, and from which Mason's copy was taken. Now this plat is simply, when fully translated, *the written assurance of Buchtel to the plaintiff in error of the quantity and quality of timber upon that land.* It is also his written assurance and representation of the location of the land and the number of acres. True, it was not signed by him, but it was his plat nevertheless, and, as we sought to show, exhibited and adopted by him.

It is no sufficient answer to our proposition to introduce the plat in evidence to the jury, that the plat is not referred to in either the contract between the Big Rapids Co. and Buchtel, or the contract of guaranty. The papers are all to be considered as a part of one and the same transaction, provided they were so in point of fact, and that they were so may be shown by parol.

To this point are the following authorities:

R. & B. R. Co. v. *Crocker*, 29 Vermont, 542.
Cornell v. *Todd*, 2 Denio, 133.
1 Phillips Ev., 4th Am. Ed., Cow. & Hill's notes, 282.
Noonan v. *Lee*, 2 Black, 499.

The plat itself was in evidence. It was attached to the report of the Referee which had been put in evidence by the plaintiff below. We sought to apply the plat itself and the figures upon it to its subject. We sought to show to what the figures upon the various sections referred, to apply them to their proper subjects and to give them a meaning. We sought to connect that plat with the contract sued upon, by showing that it was in fact a part of that contract, and that it related to a transaction of which the guaranty itself formed but a part. This was in no sense inconsistent with the guaranty. The plaintiff below having shown one portion of a transaction, beneficial to himself, we sought to show another portion of the same transaction beneficial to ourselves. That the plat *was in point of fact a part of the same transaction*, we sought to show by parol. This the Court refused to permit us to do. The opinion of Judge NELSON, already cited, shows that the fact might be proved by parol, and the Supreme

Court in *Noonan* v. *Lee* declare that by parol we might apply that plat to its proper subject matter. But in that case the Court go further and hold that where a map or plat is referred to in a deed for the purpose of fixing a boundary, the effect is the same as if it were copied into a deed. This is on the principle that the map or plat was used by the parties to the deed, and was a part of that transaction.

In that case, that fact appeared from the deed, but as we have already proven, it could as well have been shown by parol. The plat thus referred to or thus identified and connected with the deed by parol is thus made a part of it.

On authority therefor, the case at bar stands in legal effect and contemplation precisely in this shape. In the contract of guaranty sued upon, there is in addition to the guaranty the written representation of the plaintiff below, that there were upon the various sections of land covered by the contract—1,700,000 feet—1,800,000 feet—1,200,000 feet, and 1,000,000 feet of merchantable pine timber, respectively.

There are authorities in abundance in support of the general proposition that any vagueness or uncertainty in a written instrument may be removed by parol.

In *McPike* v. *Allman*, 53 Missouri, 551, parol proof was resorted to for the purpose of identifying land vaguely described in a sheriff's deed.

In *Bennett* v. *Pierce*, 28 Conn., 316, parol evidence was resorted to in order to render clear and definite an agreement for submission to arbitration. The Court say:

> " The parol evidence was not offered for the purpose of " altering or changing the terms of the written submission; " or even for the purpose of explaining an ambiguity con- " tained in it, which may be done in some cases, but, as inti- " mated, for the mere purpose of applying the instrument to " its proper subject matter, which may always be done."

The case of *Sanford* v. *The Newark and Hudson Rail Road Company*, 37 New Jersey Law, 1, presents the point directly. In that case an action was brought upon a contract for building a rail road bridge, the contract itself containing no reference to any plan. On the trial before a referee it appeared that at the time the contract was made a certain plan of the bridge was exhibited. The Court say:

" From the statement of the facts now before us it appears that at the time the contract in question was made " a plan of the bridge mentioned in it was exhibited and " referred to by the parties. The principal item in dispute is for certain work which it was alleged was done " in consequence of alterations made in this plan, and the " question of law raised before us is whether the proof of " this plan and of its subsequent alteration was legitimate. " *The ground of objection to it was that the written contract* " *did not refer to any plan of a bridge, and was intelligible* " *and complete in itself.* The rule invoked is that which " forbids the introduction of parol testimony to show anything antecedent to or contemporaneous with a written " instrument to qualify or vary its terms.

" The doctrine is of admitted force and importance, but " it does not apply to the facts of the present case. The " evidence objected to has no tendency to impair the force " or alter any of the terms of the written agreement. Its " office is merely to apply that agreement to its subject " matter."

See also to the same effect *Bertsch* v. *The Lehigh Coal & Nav. Co.*, 4 Rawle, 130; *Wardsworth* v. *Ruggles*, 6 Pick., 63.

The evidence excluded was offered not merely for the purpose of showing a warranty, which was in fact the consideration for the guaranty, but also by showing what the consideration for the guaranty in fact was, to establish a *total failure of consideration.* This need not have been specially pleaded, and it was not litigated by the Referee, nor adjudicated by him.

That a want or failure of consideration may be proved by parol is too well settled to admit of discussion. Mr. Phillips thus states the rule: " Upon the same principle " where the instrument is not under seal, the want or fail- " ure of consideration may be proved by parol. Thus in " an action upon a promissory note, on the face of which " the consideration was expressed to be for the commis- " sion due to the plaintiff for business transacted for the " defendant, it was held that the defendant might prove " that the real consideration for the note was services to " be rendered by the plaintiff at a future period, which " had never been performed."

See also,

Abbott v. *Hendricks*, 1 M. & G., 791.
Sally v. *Hinde*, 2 C. & M., 516.
Foster v. *Jolly*, 1 C., M. & R., 707.

For these reasons we respectfully submit, that the judgment of the court below should be reversed.

Chicago, January 31, 1880.

EMERY A. STORRS,
Counsel for Plaintiff in Error.

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SUPREME COURT

OF THE

UNITED STATES.

NO. 274.

THE MASON LUMBER COMPANY, Plaintiff in Error, vs. WILLIAM BUCHTEL, Defendant in Error.	***Error to the Circuit Court of the United States for the Western District of Michigan.***

Brief for Defendant in Error.

SIMONDS & FLETCHER,
Attorneys for Defendant in Error.

M. J. SMILEY,
of Counsel.

EAGLE PRINTING HOUSE—GRAND RAPIDS.

Supreme Court of the United States.

THE MASON LUMBER COMPANY,
Plaintiff in Error,
vs.
WILLIAM BUCHTEL,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

On the 23d of September, 1874, William Buchtel, the defendant in error, sold, by land contract, certain pine lands to the Big Rapids Improvement and Manufacturing Company.

The purchase price named in the contract was twelve thousand two hundred and seventy-three and 84-100 dollars; three thousand sixty-eight and 46-100 dollars payable January 1st, 1875, with interest at ten per cent., and the balance in three equal annual payments, the first annual payment to be made September 23d, 1875, with interest from the date thereof, to be paid on the 23d day of September in each year on the whole sum remaining due or unpaid in each year at the rate of seven per cent.

A deed of conveyance was to be executed when full payment had been made.

No timber was to be cut or removed from the lands without the written permission of said vender endorsed on the contract. The said contract is copied at length in the bill of exceptions. (Record, pp. 19–20.)

On the 25th day of September, 1874, the Mason Lumber Company, plaintiff in error, entered into a contract with said William Buchtel and said Big Rapids Improvement and Manufacturing Company, whereby the said last named company assigned said contract to the Mason Lumber Company. Buchtel consented that the timber might be cut and removed from the land, and the Mason Lumber Company guaranteed the payments provided by the contract to Buchtel, and payments were to be made as fast as the timber was cut and removed. This contract is in the Record, p. 21.

After the first payment fell due upon this contract of sale and guaranty, Buchtel brought suit against the Mason Lumber Company to recover the same. The suit was brought in the Circuit Court of the United States for the Western District of Michigan.

The defendant therein, the Mason Lumber Company, plead to the declaration upon said contract of guaranty the general issue, and gave notice, in accordance with the practice in Michigan, that, as an inducement to procure said promise, the plaintiff did " represent, undertake and promise that the said lands would yield five million seven hundred thousand feet, board measure, of good merchantable pine timber, which representation, undertaking and promise were false and fraudulent, and that the lands would only yield one million, five hundred thousand feet of such timber." The declaration is printed on pp. 22, 23, 24 and 25, and the plea and notice on pp. 26 and 27 of Record.

By stipulation, the case was referred to J. W. Ransom as referee for trial, and a trial was had before him of the matters in issue, and he made and filed his report with the Court, in which he found, substantially, that there was no false representation or promise, as alleged in said plea and notice, and that the plaintiff ought to recover the full amount claimed. See Record. pp. 60 to 69, inclusive. A bill of exceptions was settled before the referee.

Exceptions were made by the defendant to the report of the referee.

The exceptions were argued before the Court, and overruled, and judgment rendered by the Court in favor of Buchtel, and against the Mason Lumber Company, for the amount of said first payment upon said contract and interest.

That was the situation of the suit when the present action came on to be tried.

The present action was brought to recover the remaining instalments due apon said contract and guaranty, after the timber upon said land had all been cut and removed therefrom.

The plaintiff declared upon said guaranty as before, and the defendant plead the same matter substantially as in the first suit. See Record, pp. 8 to 12 for declaration, and pp. 13 to 15 for plea and notice.

Upon the trial of the second suit the plaintiff, after proving the original contract and guaranty, and showing that the payments were due and unpaid, and that the timber had been cut and removed from the land before this suit was brought, introduced in evidence the record of the first suit, wherein the plaintiff had recovered against the same defendant the amount due upon the first instalment of said contracts, upon substantially the same issue, and claimed that it was *res judicata* of the present suit. See Record, p. 22.

The defendant controverted this position, and claimed that said judgment was not conclusive of this suit, and that the Court, in the former suit, had not passed upon the matters in controversy in this suit.

But the Court held that the said first judgment was conclusive upon the subject of the alleged fraudulent representations, but not upon the subject of an alleged promise or warranty of the amount of timber upon the land, but that, inasmuch as the defendant relied upon parol evidence to prove the alleged promise and warranty, it was inadmissible, as tending to add to, vary and contradict the written contract between the parties, upon which this suit was brought.

This is the ruling of which the plaintiff in error complained.

In reply to the position taken by the plaintiff in error, we claim that the first adjudication was conclusive of the whole controversy in the second suit, and that the Court decided properly in rejecting the parol evidence of the alleged warranty and promise.

I.

The judgment in the first suit was conclusive of the second suit, upon the issues made by the pleadings.

The parties were the same in both suits.

The plaintiff sued upon the same contract in the second suit as in the first, for a subsequent instalment.

The pleadings were substantially the same, designed to raise the same point.

The same evidence would support both actions and defenses.

The notice in the first suit was broad enough to admit in evidence all that the defendant sought to prove as a defense in the second suit.

The issue in the second suit is precisely the same as that in the first.

The questions adjudicated were, whether the plaintiff procured the guaranty sued upon by false representations, and whether he warranted that the land had five million and seven hundred thousand feet of timber upon it. Both these questions were involved in the pleadings, passed upon by the referee, and determined in favor of the plaintiff. See Record, pp. 62, 63, folios 173 to 176.

The notice in the first suit set up a *promise*, as well as a representation, that the land would cut five millions seven hundred thousand feet of timber. See Record, p. 27, folios 73 and 74.

The evidence offered upon the subject covered all that transpired between the parties at the time the contract was made, and tended to prove a promise as much as it did to prove a representation.

See testimony of Mason, p. 30.

Testimony of Thomas Monroe, pp. 36, 37.

Testimony of Stephen Bronson, pp. 40, 41.

The burden of showing that a *promise* or *representation* had been made by Buchtel, was upon the defendant. The evidence above referred to was introduced as tending to show both a promise and representation, and covered all that was said at the time of the alleged promise and representation.

The referee found, however, in passing upon this issue that the plaintiff made no representation or promise.

The referee says p. 63, folio 175, "2. do not find that the plaintiff made any *statements* or *representations* to any of the parties present in relation thereto (the plat), or the figures upon it or to the quantity of timber these represented to be upon the lands.

See also folios 174, 175, 188, 189.

The issues in the suit being the same, the rule is well sttled, that the former adjudication is conclusive of the second suit.

See Wells Res Adjudicata, § 285 and cases cited.

In Bouchand *vs.* Dias, 3 Denio, 238. The plaintiff sued for contribution. The Court said, "The declarations in the two cases are precisely alike except that they mention different bonds as a part of the ground work of the action. But both bonds were given at the same time, upon the same consideration, and as parts of one and the same transaction. In answer to the first action, the defendant pleaded the same release and consent that are set up in answer to this action; and upon demurrer, judgment was rendered in his favor. We have then the judgment of a Court of concurrent jurisdiction directly upon the point made by this suit; and nothing is better settled than that such a judgment, so long as it remains in force, is conclusive between the same parties in another action upon the same matter. It is true that there is a shade of difference between the two cases as to the necessary proof on the part of the plaintiff to sustain the action.

Different bonds are mentioned in the two declarations. But so far as relates to the principal question in controversy to wit, the right of the plaintiff to demand, and the duty of the defendant as a co-surety to make contribution, the two cases are precisely alike. The defense is precisely the same in both actions. The matter which the plaintiff now attempts to agitate anew is *res judicata*. The case of Gardener *vs.* Buckbee, (3 Cowen 120), is in point."

The question was before this Court in Beloit vs. Morgan, 7 Wall. 619. The town of Beloit issued bonds of which Morgan became the owner, he brought suit on some of the coupons attached to the bonds and recovered judgment against the town, he then brought other suits upon a part of the same issue of bonds, the town filed a bill to enjoin the proceedings at law and to compel a surrender of the bonds. The answer set up by way of estoppel the first judgment obtained on the coupons as conclusive of the validity of the whole issue. The Court held that it was conclusive. Mr. Justice Swayne in delivering the opinion of the Court said: "On the 9th of January, 1861, the appellee recovered a judgment at law against the appellant upon another portion of these securities—though not the same with those in question in this case. The parties were identical, and the title involved was the same. All the objections taken in this case, might have been taken in that. The judgment of the court could have been invoked upon each of these, and if it were adverse to the appellant, he might have brought the decision here by a writ of error for review. The court had full jurisdiction over the parties and the subject. Under such circumstances, a jugdment is conclusive, not only as to the *res* of that case, but as to all further litigation between the same parties touching the same subject matter, though the *res* itself may be different.

An apt illustration of this principal is found in Gardner vs. Buckbee. Gardner bought a vessel from Buckbee and gave two notes for the purchase money. Buckbee sued him upon one of the notes in the Marine Court. Gardner set up as a defence, fraud in the sale, and a want of consideration. A verdict and judgment were rendered in his favor. In a suit upon the other note, in the Common Pleas of the city of New York, the judgment in the Marine Court was held to be an estoppel upon the subject of fraud in the sale. Bouchand vs. Dias, Doty vs. Brown, and Babcock vs. Camp, are to the same effect and equally cogent. Such has been the rule of the common law from an early period of its history down to the present time. But the principal reaches further. It extends not only to the questions of fact and of law, which were decided in the former suit, but also to the grounds of recovery or defence which might have been, but were not, presented.

Block vs. Commissioners, 99 U. S., 686.
See also Gardner vs. Buckbee, 3 Cowen, 120.
Doty vs. Brown, 4 N. Y., 71.
Duchess of Kingston's case, 2 Smith's Leading cases 656
Babcock vs. Camp, 12 Ohio St., 11.
Aurora City vs. West, 7 Wall. 82.
Campbell vs. Rankin, 99 U. S., 261.

In the case last above cited, it was held that the plea of *res judicata* applies to every objection urged in a second suit, when the same objection was open to the party within the legitimate scope of the pleadings in the former one and might have been presented in it. In Norton vs. Doherty, 3 Gray, 372, the point was expressly ruled that a judgment for the defendant in an action of tort for false representations of soundness on an exchange of horses, is a bar to a subsequent action of contract on the defendant's promise and warranty, at the time of the exchange, that his horse was sound.

Shaw, C. J. said, "On consideration, the Court are of the opinion that the former judgment is a good bar, because the first action was brought for the same wrong or injury, and because it could be supported by the same evidence."

See also Bigelow on Estoppel, p. 33.
Ware vs. Percival, 61 Me., 391.
Bell vs. McColloch, 31 Ohio St., 397.

If the Mason Lumber Company had in the first action recovered damages for the alleged false representations, it would have recouped the difference between the value of the land with 5,700,000 feet of timber upon it and its value with what timber it had upon it; and could it, after such recoupment, again plead recoupment upon a warranty that the land contained 5,700,000 feet of timber, and recover the same measure of damage again. If plaintiff in error is correct in his position, this could be done. We submit that it could not.

It may be proper to notice that every offer made by the defendant to prove the alleged warranty contained the identical evidence from which the defendant tried to establish the alleged false representations and warranty in the former suit. See offers of defendant, pp. 79, 80, 81, 82, to prove on the second trial.

See testimony of the same facts put in evidence to sustain the plea in the former case, pp. 29 to 43, inclusive, it being the testimony of L. G. Mason, Thomas Monroe and Stephen Bronson.

It will thus be seen that the same issue was made and passed upon in the first case by the referee that was made in this suit, and that the defendant, after failing to prove and sustain the issue in the first case sought to raise and sustain the same defence in this suit. by the same evidence and for the same purpose.

If we are correct in this position the ruling of the Court upon the second point, as to the admissibility of parol testimony to prove an alleged warranty and promise, is immaterial, because if the first judgment was conclusive of the whole matter alleged as a defence in the second suit, then the jury should have been instructed, as it was, to render a verdict for the plaintiff.

II

The Court was right, however, in its ruling upon the second point.

In considering this question it is important to know in the first place what the written agreement made by the parties is.

On the 23d day of September, 1874, plaintiff made a written agreement for the sale of certain lands to the Big Rapids Company, which forbade the cutting or removing of any timber without the written consent of the plaintiff.

Two days afterwards the agreement in question was made between the plaintiff, defendant and Big Rapids Company. It contains the following provisions:

1st. An assignment by the Big Rapids Company to defendant of the land contract. By this assignment all the rights of the Big Rapids Company are passed over to the defendant, and they are fully and specially set down in the contract itself.

2nd. The assent of the plaintiff to this assignment.

3d. The promise and undertaking of the defendant to make the payments named in the land contract as they should mature and in case the timber should be sooner cut, then to make the payments as fast as the timber is cut.

4th. The written agreement of the plaintiff, that the defendant might cut the timber on the lands.

It will be noticed that the agreement of the 20th not only incorporates into itself by reference the contract of the 23d, but is extremely special in all its parts and bears the fullest evidence of the intention to reduce the contract, whatever it was, to writing.

Now the proposition is to show that at the time this argument was made, there was another provision which was not reduced to writing but rested in parol, to wit: an agreement made by the plaintiff, that there were 5,700,000 feet of merchantable pine timber on the land, or in other words, that at the time of making the contract the plaintiff made a parol warranty. This cannot be done. The rule is that where the contract is in writing, it cannot be varied, added to or detracted from by parol evidence.

Randall vs. Rhodes, 1 Curtis, C.C. 90.
Robinson vs. McNeill, 51 Ill. 225.
VanOstrand, ads. Reed 1 Wend. 424.
Mumford et al. vs. McPherson et al. vs. 1 Johns, 414.
Dean vs. Mason, 4 Conn. 428.
Salem India Rubber Co. vs. Adams et al. 23 Pick, 256.
Smith vs. Dallas, 35 Ind. 255.
Girand vs. Richmond, 52 Eng. Com. Law, 835.
Marshall vs. Lynn, 6 M. and W. 109.
Vanderkarr vs. Thompson, 19 Mich. 82.
Martin vs. Hamlin, 18 Mich. 354.
Sutherland vs. Crane, Wal. Ch. 523.
Reward et al. vs. Sampson, et al. 12 N. Y. 561.
Zerrahn vs. Ditson et al. 17 Mass. 553.
Coon vs. Knap, 8 N. Y. 402.
Reed vs. Wood, 9 Vermont, 285.
Mellett vs. Marston, 62 Me. 477.
Etheridge vs. Palin, 72 N. C. 213.

It must be remembered that in this case no fraud could be shown under the ruling of the court as all fraud and fraudulent representations were passed upon in the former suit and consequently the question presented is the naked right to add to and vary by parol a written contract. To the rule not allowing such testimony there is no exception.

III

The offer of the defendant to show a failure of consideration, was properly rejected.

The consideration, as shown by the written guaranty, was the permission given by Buchtel to the Mason Lumber

Company to cut the timber on the land, and not the sale of the land, as that had already been sold to the Big Rapids Improvement and Manufacturing Company.

But there was admitted to be a consideration for the promise, and that the land had over twelve hundred thousand feet of timber upon it, and it was only pretended that there was a partial failure of consideration. Unless there is fraud or an express warranty shown, a partial failure of consideration furnishes no defense to a promise.

Garrett vs. Heaston, 5 Blackf., 349.
Reed vs. Prentiss, 1 N. H., 174.
Troy Academy, 24 Vt., 189.
Hubbard vs. Cooledge, 1 Metc., (Mass.) 84.
Baker vs. Roberts, 14 Ind, 552.
Wait's Actions and Defenses, vol. 6, p. 578.

This alleged partial failure of consideration could not be shown unless the defendant was permitted to vary the written contract of warranty and show that its consideration was different from that contained in the written warranty, and add to it by parol and show that the contract between the parties contained in fact a warranty.

Besides no plea or notice was given of such a defence as failure of consideration, and without such notice the evidence offered would not be admissible.

SIMONDS & FLETCHER,
Attorneys for Defendant in Error.

M. J. SMILEY,
of Counsel.

1879

11-639

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~345.~~ 115

PHILADELPHIA BAR ASSOCIATION

THE NASHVILLE AND CHATTANOOGA RAILROAD COMPANY, APPELLANT,

VS.

THE UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

FILED MARCH 14, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 345.

THE NASHVILLE AND CHATTANOOGA RAILROAD COMPANY, APPELLANT,

VS.

THE UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

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1 MIDDLE DISTRICT OF TENNESSEE, *ss:*

At a circuit court of the United States begun and held at the Federal court-room in the city of Nashville, within and for the district aforesaid, on the third Monday, being the 17 day of October, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the 101st—present, the Hon. Connally F. Trigg, United States district judge for the several districts of Tennessee; present, also, Edward R. Campbell, esq., clerk of said court, and Edward S. Wheat, esq., marshal of said district—the following proceedings were had, to wit:

On the 12th day of June, 1876, an order was entered, which is as follows:

THE UNITED STATES
v.
THE NASHVILLE AND CHATTANOOGA RAILROAD Company.

The attorney of the United States for the middle district of Tennessee having filed with the clerk of this court at a former day of the present term fifty seven coupons of the bonds of the Nashville and Chattanooga Railroad Co., for the sum of one hundred dollars each, amounting to the sum of $5,700.00, which bonds were given to the United States in pursuance of a decree of compromise rendered in this court on the 10 day of Nov., 1871, which said coupons were due and unpaid for more than 90 days prior to the filing of said coupons.

And the said attorney moved the court for a judgment in favor of the United States against the Nashville & Chattanooga Railroad Company for said fifty-seven hundred dollars, with interest, in pursuance of said decree rendered on said 10th of Nov., 1871.

And thereupon, upon application of the defendant, for good and sufficient reasons appearing to the court, this motion is continued until the next term of this court.

2 To the honorable Connally F. Trigg, judge, &c., of the United States circuit and district courts, sitting at Nashville, for the middle district of Tennessee:

Your petitioners, the Nashville, Chattanooga & St. Louis Railway, would show to your honor that during the year 1871, in the cause of The United States vs. The Nashville & Chattanooga Railroad Company, a compromise and settlement of the matters outstanding between the United States and said railroad company, whether involved directly in said suit or not, was agreed upon.

And thereupon a decree embodying this agreement and compromise was drawn up and entered upon the minutes of this honorable court on the 10th day of November, 1871. A duly certified copy of said decree is annexed hereto as Exhibit A.

It will be seen that among other things it is therein recited that, in consideration of the return to the company by the United States of the line of railway, iron rails, bridges, cross-ties, &c., owned by said railroad company, and extending from Nashville to Chattanooga, and in the condition they were in as then returned and delivered to said company, togather with certain rolling-stock, engines, &c.; and it then goes on to say, "for and in consideration of the settlement, satisfaction, and discharge of all mutual claims and accounts between the parties as they existed on the 1st day of June, 1871," that the said railroad company agreed to pay to the United States one million dollars, and had executed the mortgage upon their road-bed, &c., to secure the bonds given therefor, due at ten and twenty years (10 & 20), bearing four (4) per cent. interest, as evidenced by semi-annual coupons attached thereto.

Said decree, it will be seen, then proceeds as follows:

"It was further agreed that a final decree might be entered in this
cause setting forth the terms of this compromise and providing
3 that in case of default for more than ninety days in the payment
of any installment of interest as the same falls due, or any part thereof, or the principal debt at maturity as aforesaid, or any part thereof, the sum in default might be collected by an execution of the decree."

It is then ordered that the said company take said railroad and all its property "free from all claims or demands of the United States," and subject only to said bonded debt.

Then it is decreed, as in accordance with said agreement, that said company was indebted to the United States in the sum of one million dollars ($1,000,000), "after allowing all credits thereon for services rendered by the defendant to and for the complainant for mail service or military transportation, or any other account, prior to the last day mentioned," June 1, 1871.

It is next decreed as a part of said agreement that in the case of default in the payment of any instalment of the principal or interest of said bonds, "then the United States, on filing with the clerk of this court any of said bonds or coupons past due and unpaid for ninety days, shall have the right to have issued an order for the execution of this decree to the extent of such default."

Since the entry of this decree the said Nashville & Chattanooga Railroad Company having purchased the Nashville & Northwestern Railroad and consolidated it with its own road, by an amendment to its charter, changed its name to that of the Nashville, Chattanooga & St. Louis Railway.

Now, your petitioners would show to the court, that at the date above mentioned, June 1, 1871, among other outstanding matters was a claim on the part of the United States against said Nashville & Chattanooga Railroad Company for the loss of certain property of the United States while in transitu from Nashville to Chattanooga in said company's rail-
way, and on the 14th day of August, 1869, about two years be-
4 fore the above referred to compromise was concluded.

In a letter from the acting Q. M. General of the United States at Washington, dated February 11th, 1870, the claim is made that upon the transporting of certain officers and enlisted men of the 14th U. S. Infantry between said points, that the car in which their baggage was being transported, by accident took fire, and was burned, together with said baggage. It is claimed in behalf of the United States that this consisted of camp and garrison equipage, ordnance, and property appertaining to the Subsistance Department to the value of $\$1,227^{08}$, and was the property of the United States; also of the private property of the various officers and men of said company to the value of $\$5,893^{54}$; thus making the total claim for loss to be $\$7,170\frac{62}{100}$.

Petitioner further shows that it was in the habit of carrying and transporting troops and supplies for the U. S. Gov't, and at the time of the burning of this car the United States was indebted to this petitioner in a considerable sum, and in fact in a much larger sum than the total claim for the loss above mentioned.

These being the facts, petitioner charges that the United States, through its officers, proceeded to assess the values of their properties and arbitrarily deduct the sum so fixed, so far as the $1,227\frac{08}{100}$ for government property was conserned, from the amount due the petitioner for transportation, &c., and crediting the balance only to petitioner.

The acting Q. M. General, J. C. McFerrin, in his said letter of February 11th, 1870, made a part hereof, as Exhibit B, so announces the action of the United States as then had "in conformity with the rules of the
Q. M. Department." Not satisfied with this arbitrary and extra-
5 judicial mode of settling their claim and paying to themselves the
moneys of petitioners held by them, and giving to petitioners no hearing on the question of liability in the first place, and if liable as to the correctness of the values placed upon said property in this ex parte manner, not satisfied with the , the United States, through its officers, determined further to take the law into its own hands, as to the settlement of the claim for the individual property of persons connected as officers or enlisted men with its Army.

In pursuance of this determination as expressed in the language of said acting Q. M. Gen'l—Exhibit B—"The Secretary of War has directed that the Q. M. Gen'l will take measures to collect the sums lost by the officers and soldiers specified, by the neglect of the railroad company. It is proposed to stop the amount of these losses against the transportation accounts of the railroad company now under adjustment in this office."

Petitioner charges that this was an act of usurpation of the functions of the courts of justice, and a fraud upon petitioner's rights; that the officers and men were sui juris; that the courts of the land were open to them; if they had any just claim against petitioner they could enforce it therein.

Petitioner is advised, and so charges, that it was a monstrous and illegal assumption of power, on the part of the officers of complainant, to assume to adjudge first that under the facts set up herein the petitioners were liable to these officers and men, who stand in this matter as any individual citizens; and secondly, having determined petitioner's liability, to proceed to adjudge the damages, and appropriate the moneys due by the United States to petitioners to the payment thereof in this illegal and ex parte manner assessed.

Petitioner denies all liability on account of said loss, and charges
6 that the car in which property was placed in charge of the said
officers and men and was d*is*troyed through their negligence alone and owing to the inflam'able and combustible nature of the stores placed therein.

As to the amount of the claim of these officers and men, petitioner alleges it was exaggerated and fictitiously large, two of the officers alone claiming for personal baggage over $3,800, and the same covered, in the case of L'eut. Ilges, such items as these: "$452 in currency greenback, gold quartz $100," "private papers and pictures $100," "six (6) ounces of gold dust $120." That of L'eut. Shultz was made up of such items as these: "Books $150"; "papers of very high value, which cannot be replaced, $250"; "gold watch and chain, $150," &c., &c.

Petitioner submits that a court differently constituted from this self-created judiciary would not have held petitioner liable in any event for this character of property as private baggage.

After deducting these two sums for damages claimed to have been sustained by the United States and the officers and men aforesaid, and amounting in the aggregate to $7,170\frac{62}{100}$, there was then, Feb'ry 11, 1870, a balance due petitioner of $. But petitioner having its hands in the lion's mouth, must need get it out as best he could, and make the best compromise in its power to save further loss in a con*sent* with so powerful an adversary, and the general compromise and settlement, as shown by Exhibit A, was consented to.

Now, as petitioner has shown herein, before the final settlement and compromise between it and the United States, as set out in said decree, was a settlement in full of all mutual claims and accounts between the parties as they existed on the 1st day of June, 1871, and that this in terms included all moneys due by the United States at that time for military transportation.

And petitioner charges that the balance then, June 1, 1871,
7 due it by the United States Gov't had been ascertained by the
United States, after deducting the sums claimed for damages sustained above, and this balance having been settled, satisfied, and adjusted in the compromise as decreed, settled all claims for said damages.

And petitioner is advised that the United States after having taken the adjudication and settlement of these claims for lost baggage into its own hands and having retained the money so due to petitioner to pay the same with, it will be estopped to deny that the claims were so paid and settled or to set up the illegality of its own action.

Nevertheless, as petitioner is informed and believes, the United States through its officers as present in power insist upon the construction of the compromise decree as not settling and concluding the matter of the claims for the lost baggage, but have retained to pay them moneys that have become due to petitioner for services performed in military transportation and carrying the mails since the date of said settlement and compromise of June 1, 1871.

The said sums so retained amount to between $ and $, and which said sum petitioner has applied to the Secretary of War and other proper officers of the United States again and again for payment of, and been refused as often.

Petitioner's long continued efforts made for the settlement and payment by the United States of the moneys thus justly due petitioner, and wrongfully detained from it by that gov't, having failed, it at last, in the hopes of obtaining relief from the properly constituted courts of said government, refused to pay the coupons on the bonds executed and delivered to the United States, falling due Dec'r 1, 1875, as provided in said decree of compromise, to the extent of $,
8 being the amount then due it, which had been passed upon, and
finally allowed by the Second Auditor's Office for transportation and mail service, rendered by it to the United States since said June 1, 1871, though there was considerably more due to petitioner for like services rendered since said date, that had not as yet been finally passed on by said office.

And petitioner, in a letter written through its president, E. W. Cole, of date May 22, 1876, addressed to Hon'e A. Taft, the then Secretary of War of the United States, directed that this sum so ascertained to be due, and finally passed upon by the Second Auditor, be applied to the payment of the coupons on said bonds due on Dec'r 1, 1875. A copy of said letter is annexed hereto, marked Exhibit C.

This letter was answered by direction of the Secretary of War, enclosing also an answer from the Q. M. General of the United States, declining to so apply this money, and for the purpose of having the matter acted upon and judicially settled, as complainant understands, the coupons so directed to be paid were sent to this court and filed as being the mode of beginning suit thereon against petitioner set out in said compromise decree. The letters from the War Department, and Q. M. General aforesaid, are hereto annexed and marked Exhibits D and E.

The premises considered, petitioner prays that the coupons so filed, as aforesaid, amounting to $, be held and deemed as paid and satisfied by the appropriation of the fund as directed by petitioner, as above set out; that they be cancelled and for naught held, and delivered up to petitioner; that the claims both in behalf of the United States and of the said officers and men be treated and held as settled and satisfied and paid in the manner herein set out and under said final compromise decree.

9 But should the court be of the opinion that the effect of said settlement and compromise only extended to the claim of the United States, and not to that of the private individuals serving as officers and enlisted men in its Army, that then these individual citizens be put on the same level and footing as all other citizens and remanded to the proper courts for adjudication of their rights.

EAST & FOGG,
Sol'rs for Petitioners.

EXHIBIT A.

MIDDLE DISTRICT OF TENNESSEE, *ss:*

At a circuit court of the United States begun and held at the capitol of said State, in Nashville, in and for the district aforesaid, on the third Monday, being the 16th day of October, 1871—present the Hon'e Connally F. Trigg, United States district judge for the several districts of Tennessee, presiding—the following proceedings were had, to wit:

On the 10th day of November, 1871, a decree was entered, which is as follows:

THE UNITED STATES
vs.
THE NASHVILLE & CHATTANOOGA RAILROAD Company et al. } 1515. In equity.

Be it remembered that on the 10th day of November, 1871, this cause was heard before the judges of the circuit court of the United
10 States for the middle district of Tennessee, at Nashville, upon its equity side, upon the bill of complaint, exhibits, previous proceedings, and agreement of parties, in the presence of R. McPhail Smith, United States district attorney, representing the complainant, and E. H. Ewing and W. F. Cooper, solicitors of the defendant; when it appeared to the court, that since the last term, in and by virtue of an act of Congress in that behalf, a compromise of all the matters in litigation between the parties has been entered into, and fully consummated upon the following terms, stipulation and conditions, namely:

The defendant, the Nashville & Chattanooga Railroad Company, for an' in consideration of the return and surrender to it by the United States of its road, as it existed at the time of the said return and surrender, with all the iron, cross-ties, bridges, and other fixtures, appertеinances and effects in any wise appertaining and belonging to the said road, and returned and surrendered and turned over therewith, and for and in consideration of the rolling-stock, depot-houses, and all other the property and effects, sold and delivered by the United States to the

said defendant, and for which compensation is claimed by said bill; and for and in consideration of the transfer and assignment of said road, rolling-stock, fixtures, appurtenances, and all other said property and effects as aforesaid, by the United States to the said defendant, with all the rights of the United States therein acquired by conquest or otherwise, and for and in consideration of the settlement, satisfaction and discharge of all mutual claims and accounts between the parties as they existed on the first day of June, 1871, admitted that there was due from the defendant to the United States on that day the sum of one million of dollars, and agreed to pay the same as follows: one-half of
11 said sum, viz, five hundred thousand dollars, to be paid ten years
after the first day of June, 1871, and the other half twenty years from said date, with interest upon the whole of said principal sum until paid, at the rate of four per cent. per annum, payable semi-annually, on the first day of December and June, counting from 1st June, 1871, the said principal and interest made payable at and secured by the bonds of the Nashville & Chattanooga Railroad Company, and a mortgage of company's road, property, income and franchises.

It was further agreed that a final decree might be entered in this cause setting forth the terms of this compromise, and providing that in case of default for more than ninety days in the payment of any instalment of interest as the same falls due, or any part thereof, or of the principal debt at maturity as aforesaid, or any part thereof, the sum in default might be collected by an execution of this decree.

It further appearing, by the admission of the parties by their solicitors in open court, that this compromise has been carried out by the execution by the Nashville and Chattanooga Railroad Company of its bonds with interest coupons attached as agreed upon, and by their further execution of a satisfactory mortgage of the road, property, income and franchises to secure the said bonds and coupons, according to the terms of the agreement, and the delivery thereof to and acceptance thereof by the United States: It is therefore, by consent of parties, ordered, adjudged, and decreed that the compromise as aforesaid be entered and made the decree of this court, and that the rights of the parties be and they are hereby declared, adjudged, and decreed accordingly.

That the said Nashville & Chattanooga Railroad Company take their road with all its appurtenances as aforesaid, and all the
12 rolling stock, property, and effects as aforesaid, with all the rights
of the United States therein free from all claim or demand of the United States, and subject only to the debt and lien secured by the said agreement of compromise and of this decree.

And it is further found by the court, in accordance with the terms of said agreement of compromise and settlement, that there was due from the defendant to the United States on the 1st day of June, 1871, for and on account of the claim set forth in the bill of complaint, after allowing all credits thereon for services rendered by the defendant to and for the use of the complainant, for mail service or military transportation, or on any other account, prior to the day last aforesaid, a balance amounting to the sum of one million dollars, to bear interest from said day at the rate of four per cent. per annum, payable semi-annually on the 1st day of June and December of each year. One-half of said principal, to wit, the sum of five hundred thousand dollars, to be paid on the first day of June, 1881; the remainder thereof, to wit, five hundred thousand dollars, to be paid on the first day of June, 1891.

It is therefore ordered, adjudged, and decreed that the defendant pay to the complainant the sums so as aforesaid found due, with the interest thereon as the same accrues, and that the said sums of principal and interest thereon as aforesaid, and the payment thereof as hereby ordered, stand as a charge and lien upon the road and property of the defendant hereinbefore described, and upon the road, property, income, and franchises as set forth in the mortgage which has been executed in compliance with the agreement of compromise, and that if at any time hereafter the said Nashville & Chattanooga Railroad Company make default for the period of ninety days in the payment of any of the installments of interest or of principal of said debt, or any part thereof, 13 after the same shall have become due and payable according to tenor and effect of said bonds and coupons, then the United States, on filing with the clerk of this court any of said coupons or bonds past due and unpaid for ninety days, shall have the right to have issued an order for the execution of this decree to the extent of such default by the sale of the railroad and other property of the defendant as hereinbefore described, subject to the continued lien of the decree, and of said bonds and mortgage representing the same debt as the amount thereof then remaining and not due at the time of said sale, the said sale to be made as other sales of real estate under judicial process as required by law and the practice of this court to be made, and for this purpose this cause is retained in court until otherwise ordered.

It is further ordered that the defendant pay all cost of this cause, including the cost of this decree; and in default thereof execution is hereby awarded.

* * * * * * *

UNITED STATES OF AMERICA,
Middle District of Tennessee, ss:

I, Edward R. Campbell, clerk of the circuit court of the United States for the middle district of Tennessee, do hereby certify that the foregoing is a true and perfect copy of the final decree of said court entered on the 10th day of November, 1871, in the cause of the United States vs. The Nashville & Chattanooga Railroad Company et al., as the same appears of record in my office.

In testimony whereof I have hereto set my hand and affixed the seal of said court, at Nashville, this 18th November, 1875.

E. R. CAMPBELL, *Clerk*,
By J. W. CAMPBELL, *D. C.*

14 EXHIBIT B.

QUARTERMASTER-GENERAL'S OFFICE,
Washington, D. C., Feb'y 11, 1870.

JNO. W. THOMAS,
Sup't Nashville & Chatta. R. R. Co., Nashville, Tenn.:

SIR: Herewith are respectfully transmitted copies of the claims of certain officers and enlisted men of the 14th U. S. Infantry for losses of private property incurred by destruction by fire of a baggage-car, with its contents, at Murfreesboro, Tennessee, on the Nashville and Chattanooga Railroad, August 14, 1869.

It appears that the detachment was being conveyed from Nashville to Chattanooga on an order for transportation issued to the R. R. co. by an officer of the Quartermaster's Department.

The claimants have prepared descriptive lists with money value of the articles lost by them respectively. The correctness of each of the lists is substantiated by the affidavit of the party whose lost property is described therein, and in the case of the privates and non-commissioned officers also by certificate of the commanding officer.

The following is a statement of the value of the lost private property as claimed:

Bvt. Lt. Col. Guido Ingles	$2,096 50
1st Lt. Philo Schultze	1,771 50
Q'rm'r-Serg't James Demott	113 61
Serg't Elan F. Courrier	83 50
15 Serg't August Kruzer	73 09
Michael Burns	75 92
Corporal Otto Mucklisch	79 36
" John Hineley	64 79
" H. D. Sullivan	117 97
" Thomas McDonnell	99 58
" Gustave Walden	86 44
" Richard Gibson	68 01
" J. Slezanowski	71 98
Private Charles Fillmore	90 84
" J. Fitzpatrick	61 92
" J. Birmingham	59 76
" Thos. Geraghty	53 37
" Ira P. Weldman	70 67
" John Welholland	62 68
" Edward Banmann	56 29
" Edw. J. McGee	81 52
" Jos. C. Herbert	80 96
" M. Gilligan	87 99
" John Henderson	63 69
Musician Berry Whitehouse	64 33
" James Moore	87 02
	$5,723 29
Also property belonging to Co. B	170 25
	$5,893 54

The Secretary of War has directed that "the Quartermaster-General will take measures to collect the sums lost by the officers and soldiers specified by the neglect of the railroad company."

It is proposed to stop the amount of these losses against the transportation accounts of the railroad co. now under adjustment in
16 this office; 1st Lieut. Philo Schultze, 14th U. S. Infantry, A. A. Q. M., Chattanooga, Tenn., who filed the claims in this office, has been advised accordingly.

The following amounts being for public property destroyed will be deducted from the transportation accounts of the railroad co. in conformity with the rules of the Q. M. Department:

Clothing, camp and garrison equipage	$536 38
Ordnance and ordnance stores	440 70
Property appertaining to Subs. Depart	250 00
Total	1,227 08

Very respectfully, your ob't serv't,

J. C. McFERRAN,

Deputy Q. M. General, Act'g Quartermaster-General, U. S. A.

W. D. Bk. 13. W. 1686.
4 D. Bk. 10 W. 439.
Enclosures.

EXHIBIT C.

HON. A. TAFT,
Secretary of War, Washington, D. C.:

SIR: I beg that you will read, or have read, the correspondence on file in the departments between I. W. Thomas, gen'l sup't of this company, and myself, with the officers in the Quartermaster's Department, and your predecessors in the War Department, upon a demand of the War Department upon this company to pay claims made by certain individuals known as the "Schultz claim," amounting
17 to $5,723.00, which demand the company was and is advised by its attorney is not legal and valid; yet money in the Auditors' offices of the government due this company, amounting to $13,912.99, has been withheld from us by order of your predecessor on account of these individual claims, while the government's own court in this State has been open to the prosecution of the claims of these individuals.

Considerable correspondence has passed between the officers of this railroad and those of the government upon this subject, and yet the money due this company in the Auditor's office was and is withheld.

Enclosed I beg to hand you copy of a letter dated July 5, 1875, addressed to the Hon. Wm. W. Belknap, Secretary of War, and to which I received no reply.

This company could not see the justice or right of the Secretary of War undertaking to protect individuals in disputed claims against this company by attaching moneys due us in the hands of the Auditor of the government. This company could not see that in these peac'able times, when the courts were open in Tennessee, that military men stood on any higher level than civilians, and therefore considered the order of the Secretary of War as arbitrary. There was but one course for this company left to test the matters in dispute, and that was an appeal to the courts. Therefore they determined to withhold and did withhold $5,700.00 coupons of this company due the government on the 1 Dec'r last.

Notwithstanding the fact that by the War Department's order the money in the Auditor's office is still held under attachment
18 (not a legal attachment, to be sure, but an arbitrary order of the War Department), I say, notwithstanding this fact, I find that the coupons not paid as before stated have been sent out to the U. S. Attorney-General here for prosecution against this company. Now, we do not desire any litigation with the government, but this company has rights as well as the government; and upon a fair investigation and consideration these rights will be allowed to the company.

In addition to this, compensation for carrying the U. S. mails on the Nashville and Northwestern Railroad, a road purchased and paid for by this company from the State of Tennessee, has been withheld for several years upon the ground that the old company owning that road owed the government for supplies bought some ten years ago. That company became bankrupt, and the State sold the road to pay its first lien upon it, and this company became the purchaser, at a price that has been entirely unremunerative, and yet the government has withheld this mail pay upon grounds that would not be valid in any court of law or equity. Yet our company has continued to carry the mail upon that road, hoping that better counsel would prevail, and an issue with the government by refusing to carry its mail would be prevented.

Now, we think these acts of the government officials arbitrary, to say the least of them, and they are working great injury to this company.

Previous to the 1st of December, 1875, we paid promp'ly and regularly the coupons to the government, and paid all due at that time except $5,700.00 withheld on account of the money in the Auditor's department, withheld from us by order of the War Department.

19 We have other claims against the government which have not been recognized, and which we think are just and right; and while they may be small matters to the government are of large interest to this company; but as before remarked, we do not wish litigation with the government, and would prefer adjusting all differences upon a just and equitable basis; and if I could be encouraged to believe that overtures by the company in that direction would be received kindly by the officers of the government I would go to Washington for that purpose.

If you can spare enough of your valuable time to give a little attention to these matters and reply, I shall feel obliged.

Very respectfully, your ob't serv't,

E. W. COLE, *Pres't.*

P. S.—You will please appropriate enough of the money now held in the Auditor's office to the payment of the coupons referred to, upon which suit has been ordered here, and have the balance remitted to the company, together with the coupons so paid.

EXHIBIT D.

WAR DEPARTMENT,
Washington City, June 27, 1876.

Mr. E. W. COLE,
President Nashville, Chattanooga and St. Louis Railway, Nashville, Tennessee :

20 SIR: In answer to your letter of the 22 ultimo, concerning the matters in controversy between your road and the government, I am directed by the Secretary of War to inform you that your communication was referred to the Quartermaster-General, who sustains the course heretofore taken by this department.

Your letter and the report of the Quartermaster-General will be transmitted to the Department of Justice, with which the matter now rests, and to which all the other papers in the case have been sent.

A copy of the report of the Quartermaster-General is herewith enclosed.

Pending the action of the Department of Justice, any further proposition which you may see fit to make with a view to a settlement of the claims for the losses by fire on your road of the government and Schultze and others shall secure full consideration.

Very respectfully, your obedient servant,

HENRY GOODFELLOW,
Judge-Advocate.

EXHIBIT E.

WAR DEPARTMENT,
QUARTERMASTER-GENERAL'S OFFICE,
June 5, 1876.

To the honorable the SECRETARY OF WAR:

21 SIR: I have the honor to return herewith the letter from Mr. E. W. Cole in relation to Schultze claims, and the postal dues of

the Nashville and Northwestern R. R. Co., and to state that the matter of the Schultze claims has been the subject of many reports to the War Department by this office, which, together with all the papers relating thereto are on file in the War Department. Attention is invited to them.

Notwithstanding the allegations of the company (see letter of July 5, 1875), "that no railroad company could be made liable as a carrier of baggage for many of the articles making up the aggregate value as made out in the Schultze claim," it is a fact that considerable property belonging to individual members of the 14th U. S. Infantry, and government property, amounting in the aggregate as claimed to $7,120.62, was destroyed while being transported by the company, and that undoubtedly the company is liable for a portion of that property. There is no doubt but that the charges made by the men for many of the articles belonging to them were ex*h*orbitant, and that the company ought not to pay the full amount claimed. It is also possible that the courts would not hold the company liable for some of the articles destroyed; however this may be, the company has repeatedly expressed its desire and willingness to have the matter tested in the courts, and refused to pay a portion of the interest Dec'r 1, 1875, due on its debt for railway material, compromised under the act of March 3, 1871, for the very
22 purpose of compelling the government to sue for the money so due and unpaid, so that the company could bring in this Schultze matter and have it judicially passed upon.

This department has been desirous that this Schultze matter might be disposed of in some way, as it is a matter of much annoyance and perplexity, and to that end has made many reports to the War Department, with such suggestions as seemed proper. It is powerless to settle it, as it is hampered with the decisions of the accounting officers of the Treasury on the one hand, and the refusal of the company to pay the amount, or to consent to the payment of any reasonable sum, on the other hand, and the only alternative seems to be to either bring suit against the company in some way or other, and so let the courts pass upon the case, or to abandon the matter altogether, and inform the men that the government is powerless to hold the company to its responsibility for the losses, or to afford them any relief whatever.

The Quartermaster-General cannot recommend that the amounts withheld by the Treasury Department to cover the Schultze losses be applied to the payment of another and entirely different debt, payment of which is to be made under the agreement to the Assistant Treasurer of the U. S. at New York City. The company should pay that money as agreed upon or the suit which has been commenced to recover it should go on.

In the matter of the compensation for carrying the U. S. mails on the Nashville and Northwestern Railroad withheld by the government, the facts are these, the N. & N. W. R. R. is indebted to the gov-
23 ernment $865,982.83, for the property purchased in 1865 under executive orders. One of the conditions of the purchase was that all sums due for carrying the mails and for transportations of troops and property of the U. S. should be held and applied to the payment of the debt.

The N. & N. W. R. R. being indebted to the State of Tennessee for bonds loaned to the company, and having failed to provide for the payment of the interest thereon, the State sold the road to the Nashville and Chattanooga Railroad Co. The N. & C. Co. claim that they purchased the road free from the government debt, and therefore ought not to have its postal dues withheld for the purpose of paying the debt of the N. & N. W. R. R. Co. The gov't holds that its lien had priority to the lien of the State of Tennessee; that the sale of the road was made subject to the claim and lien of the U. S.; that the N. & C. Co. purchased with notice of that lien, and is therefore bound by it. Suit is pending against the N. & N. W. Co. to recover the amount due the U. S., and the U. S. attorney has recently been instructed by the Attorney-General to press the suit to final decision.

The Quartermaster-General is not aware that anything has been done arbitrarily, either in the Schultze matter or in the matter of the postal dues of the N. & N. W. R. R. It has kept the War Department fully advised of its actions in both cases, and in the latter case has 24 acted only in pursuance of instructions from the Secretary of War.

Very respectfully, your ob't servant,
(Signed) M. C. MEIGS,
Quartermaster-General, B'v't Maj'r Gen'l, U. S. Army.

The foregoing petition and Exhibits A, B, C, D, and E were filed November 13, 1876.

E. R. CAMPBELL, *Clerk.*

On the 22' day of November, 1876, a demurrer to the petition was filed, which is as follows:

On motion for a judgment against said company on fifty-seven hundred dollars of coupons of said Co. payable to the United States.

THE UNITED STATES
vs.
THE N. & C. R. R. CO.

The demurrer of A. M. Hughes, United States district attorney for the middle district of Tennessee, to the petition of the defendant filed in this cause.

The plaintiff, by said attorney, by protestation, not confessing or acknowledging all or any of the matters and things in said defendant's petition to be true in such manner and form as the same are therein set forth and alleged, doth demur to the same, and for cause of demurrer shows:

1st. That the petition seeks to institute a suit against the United States in the nature of a set-off for the purpose of adjudicating and settling a controversy between the War Department and the defendant, in a controversy between them in regard to the burning of a railroad car, and the loss incident thereto, by the Government of the United States, and certain soldiers of the United States for their private 25 baggage, etc., involving the sum of seven or eight thousand dollars.

2nd. Because it seeks to obtain redress or allowances of certain claims which the defendant insists is due it from the United States for transportation, &c.

3rd. Because it seeks to appropriate to the payment of this debt a claim which has been allowed them by the auditing officer of the Treasury Department for the sum of $5,700, which they insist has been withheld by order of the War Department.

4th. Because the court has no jurisdiction to audit and settle accounts between the United States and the petitioner, as asked for in said petition.

5th. Because the petition seeks the aid of this court to compel the performance of an alleged duty by the auditing officer of the government.

Wherefore the plaintiff demands the judgment of the court whether any other or further answer or defense to said petition, or any of the matters and things therein contained, shall be made, and prays that said petition be dismissed with the costs in this behalf sustained.

A. M. HUGHES, *U. S. Att'y.*

On the 23 day of November, 1876, a decree was entered, which is as follows:

THE UNITED STATES
v.
THE NASHVILLE AND CHATTANOOGA RAILROAD COMPANY.

This cause came on again to be heard before the Hon. Connally F. Trigg, judge, &c., upon the former proceedings had herein, and 26 the petition of the defendant filed in this cause on the 13 November, 1876, seeking to make defense in this cause as stated in said petition, and the demurrer filed by the attorney of the United States to the matters and things stated in said petition.

The court is of opinion that the demurrer is well taken, and sustains the same, and dismisses said petition.

And it further appearing to the court that at a former term of this court the said U. S. attorney filed with the clerk of this court fifty-seven certain coupons from bonds of the said railroad company for one hundred dollars each, which were due and payable for more than 90 days before the filing thereof, and that said coupons fell due and were payable on the 1st day of December, 1875: It is therefore ordered by the court that an execution issue against the Nashville and Chattanooga Railroad Company for the sum of fifty-seven hundred dollars, with interest thereon from the 1 day of December, 1875.

From the ruling of the court sustaining the demurrer and the decree pronounced herein the defendant, the Nashville and Chattanooga Railroad Company, excepts, and prays an appeal to the Supreme Court of the United States, at the next term, commencing on the second Monday in October next, which appeal is granted upon defendant's executing bond with good and sufficient security in the sum of one thousand dollars, conditioned according to law.

And time is given the defendant until January 1, 1877, within which to give said bond.

On the 20 day of December, 1876, an appeal bond was filed, which is as follows:

27 In the circuit court of the United States for the middle district of Tennessee.

THE UNITED STATES OF AMERICA, complainant,
v.
THE NASHVILLE AND CHATTANOOGA RAILROAD COMPANY, de'f't.

Know all men by these presents that we, the Nashville, Chattanooga and St. Louis Railway, a corporation existing under the laws of the State of Tennessee, as principal, and E. W. Cole and I. W. Thomas as securities, are held and firmly bound unto the United States of America in the penal sum of one thousand dollars, to be paid to the said United States, for which payment well and truly to be made be bind ourselves and each of us jointly and severally, and our and each of our successors, heirs, executors, and administrators firmly by these presents, signed with our hands, sealed with our seals, and dated this the 20 day of December, 1876.

Whereas the above bounden Nashville, Chattanooga and St. Louis Railway hath prayed an appeal to the Supreme Court of the United States, at the city of Washington, to reverse a decree rendered by the circuit court of the United States for the middle district of Tennessee, on the 23 day of November, 1876, in the above entitled cause:

Now, therefore, the condition of this obligation is such, that if the above named Nashville, Chattanooga and St. Louis Railway shall prosecute its said appeal and answer all costs and damages if it shall fail therein, then this obligation shall be void, otherwise to remain in full force and virtue.

NASHVILLE, CHATTANOOGA & ST. LOUIS R'Y,
28 By E. W. COLE, *Pres't.* [SEAL.]
E. W. COLE, *Secretary.* [SEAL.]
I. W. THOMAS. [SEAL.]

UNITED STATES OF AMERICA,
Middle District of Tennessee, ss:

I, Edward R. Campbell, clerk of the circuit court of the United States for the middle district of Tennessee, do hereby certify that the foregoing is a true and perfect transcript of the record and proceedings had in said court in the case of the United States of America against the Nashville and Chattanooga Railroad Company pertaining to the motion of the attorney of the United States, entered June 12, 1876, for judgment upon certain coupons of said company due to the United States, as appears of record and on file in my office.

In testimony whereof I have hereto set my hand and affixed the seal of said court at Nashville this 20 day of January, 1877.

[SEAL.] E. R. CAMPBELL, *Clerk.*

(Indorsement on cover:) No. 345. The Nashville and Chattanooga Railroad Company, appellant, vs. The United States. M. Tennessee, C. C. U. S. Filed 14th March, 1877.

OFFICE SUPREME COURT U.S.
FILED
MAR 3 1880
D. W. MIDDLETON, Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1879.

THE NASHVILLE, CHATTANOOGA AND ST.
LOUIS RAILROAD CO., Appellant,
vs.
THE UNITED STATES, Appellee.

Appeal from the Circuit Court of the United States for the Middle District of Tennessee.

BRIEF FOR APPELLANT.

J. E. BAILEY,
Of Counsel.

Globe Job Print.

Supreme Court of the United States.

OCTOBER TERM, 1879.

NASHVILLE, CHATTANOOGA, AND ST. LOUIS RAILROAD COMPANY

VS.

THE UNITED STATES.

STATEMENT.

The Nashville and Chattanooga Railroad Company, a corporation created by the State of Tennessee, bought from the United States, in the year 1865, a number of locomotives, and cars, and other materials for equipment, and executed its bond, or, promissory notes for payment of the contract price at a future day.

Payment was not made as agreed upon, for in the meantime the railroad company claimed that it was justly and equitably entitled to an abatement of prices, and moreover the United States had become indebted to it for transportation of mails, military stores, and troops. For these services the United States refused payment until the indebtedness of the company to it should be discharged.

In addition to these differences, it appears from the petition, that on the 14th day of August, 1869, a baggage car, belonging to the company and engaged in transporting stores and troops for the United States was destroyed by fire. In the fire, stores the property of the United States, of the value of $1,227.08, and money, jewelry, books, and baggage, the property of the officers and enlisted men in the army, claimed to be of the value of $5,725, were lost.

"The United States, through its officers, proceeded * * * to deduct the * * $1,227.08 from the sum" then due to the railroad company for services rendered and "credited only the remainder to petitioner."

See record page 3 of printed record, also see letter of Quartermaster General, page 8 of record.

The Secretary of War directed that the Quartermaster General should take measures to collect the sums lost by officers and soldiers in the fire, and the Quartermaster General announced to the company his purpose "to stop the amount of their losses against the transportation account of the railroad company now under adjustment in this office."

See letter dated 11th day February, 1880, pages 7–8 of printed record.

After making these deductions there was still a balance due the company from the United States.

See record, pages 3 and 4.

The railroad company protested against this arbitrary settlement, but pending the controversy, the United States brought a bill, in the circuit court for the middle district of Tennessee, against the company for the recovery of the contract price agreed to be paid for the locomotives, cars, &c.

The cause remained in court until the 10th day of November, 1871, when by authority of an act of Congress a settlement was made and a consent decree entered, which recites:

"That for and in consideration of the settlement, satisfaction, and discharge of all mutual claims and accounts between the parties *as they existed on the first day of June, 1871,*" the defendant "admitted that there was due from it to the United States on *that day* the sum of one million of dollars, and agreed to pay the same as follows: One-half of said sum, viz: five hundred thousand dollars, to be paid ten years after the first day of June, 1871, and the other half, twenty years from said date, with interest upon the whole of said principal sum until paid, at the rate of four per cent. per annum, payable semi-annually on the first days of December and June, * * * * * and secured by the bonds of the Nashville and Chattanooga Railroad Company, and a mortgage of company's road, property, income and franchises.''

It is was further agreed that "a decree should be entered, setting forth the compromise, and providing that in case of default for more than ninety days in the payment of any instalment of interest as the same falls due, or any part thereof, the sum in default might be collected by an execution of the decree.''

The court thereupon adjudged and decreed "that there was due from the defendant to the United States, on the first day of June, 1871, for and on account of the claims set forth in the bill of complaint, after allowing all *credits thereon for services rendered* by the defendant to and for the use of the complainant for mail service or military transportation, or on any other account *prior to the day last aforesaid*, a balance amounting to $1,000,000,'' which sum the defendant was adjudged to pay with interest as the same accrues; and if at any time the said "company make default for the period of ninety days in the payment of any of the instalments of interest or principal according to the tenor of 'said bonds and coupons,' then the United States, on filing with the clerk the bonds or coupons, shall have the right to an execution of the decree *to the extent of such default*,'' and for this purpose the cause was retained in court.—Record, pp. 6 and 7.

After this decree was entered, the Nashville and Chattanooga Railroad Company bought the Nashville and Northwestern Railway, its franchises and privileges, (see Record, p. 2,) and by authority of the State of Tennessee, within whose limits both railways lie, changed its name to "The Nashville, Chattanooga and St. Louis Railroad Company.''

It is the same corporation, with enlarged capacities and properties, bearing, by authority of law, a different name.

When called by the new name, *and after the settlement before recited,* it rendered other services to the Government, in transporting its mails, troops and military stores, to a value exceeding the sum now in controversy, and the sums to be paid have been admitted and fixed by the proper Department; but the officers of the Government, ignoring the fact that "all *mutual claims and accounts between the parties as they existed on the* 1st *day of June,* 1871," have been "settled, satisfied and discharged" by the compromise and decree, revived part of the old claim, and refused to pay the sums of money admitted to be due for services rendered after that date, and withheld payment in satisfaction of the alleged value of the money, jewelry, baggage, &c., lost by the officers and soldiers in the fire that occurred in 1869.

The railroad company promptly fulfilled its obligations, and paid the interest upon the debt of $1,000,000 until the year 1876, when it refused to pay coupons to the amount of $5,700, a sum smaller than was due to it for services admitted and allowed by the accounting officers.—See Record, p. 8.

Thereupon these coupons were filed in the circuit court of the United States for the district of middle Tennessee, and judgment demanded.

Upon application of the company the motion was continued, and afterwards a petition was filed setting forth the facts, and asking that the sum due from the United States should be set off against the amount due upon the coupons.

A demurrer was filed by the district attorney to the petition, the petition was dismissed, judgment rendered upon the coupons, and the cause has been brought here by appeal.

BRIEF.

It thus appears, and the brief filed by the Attorney General and his assistant shows the fact to be, that although the original proceedings in the circuit court of the United States were on the chancery side of the docket, the claim asserted by the United States was a legal claim—not equitable—the object being to coerce payment of sums of money agreed to be paid upon a contract for the purchase of locomotives, &c., &c.

The decree made upon compromise recites that bonds were executed for the payment of the money agreed to be paid upon a compromise, and the cause was retained in court in order that judgments should be entered and executions as at law issued for interest or principal, in respect to the payment of which defendant should be in default.

Although a decree was entered, final in its terms, it only provided for payments to be made *in futuro*, and contemplated the possibility of a failure to meet engagements assumed at the time of the decree. The whole affair was a compromise and a new contract. The only office performed by the court was to enter upon its records the agreement of the parties.

The defendant could not be in default without failure to pay the sums of money as stipulated by its bond. The coupons attached to the bonds were negotiable instruments, could have been sold in the markets, and their purchase would have conferred upon the purchaser the right to an action at law to recover the money due.

The United States, if it chose to do so, might have brought an action upon each unpaid coupon, and the only effect of the agreement and decree was to give to the United States a summary remedy for the recovery of a legal demand.

Each application to the court for judgment may then be regarded as simply an action to recover the sum due, in respect to the payment of which the defendant was in default, and the defendant is entitled to every defence, and every remedy which could be asserted in a direct action against it.

The defendant can plead payment, accord and satisfaction, or any other legitimate plea, as judgment may from time to time be demanded. Now if this were a direct action, there can be little doubt that the defense made would be sustained.

The United States, according to the statement of the petition, is indebted to the defendant in a sum greater than the amount claimed. In the petition the sum is left blank, but the letter of Cole, its president, addressed to Secretary Taft, (page 9,) which is made an exhibit, and is to be taken as part of the petition, shows the sum to be $13,912.99. (This letter was written 22d May, 1876, as shown by the petition, on page 4 of printed record and page 8 of the manuscript.)

This sum of money, as appears from the correspondence, is agreed to be due, but the Government refuses to pay it, because of the alleged liability of defendant to make compensation for losses by the burning of the car.

In the United States vs. Robinson, 9 Peters, 324, it is held, that in an action by the Government, where the defendant has in his own right an equitable claim against the Government for services rendered, or otherwise, and has presented it to the proper officer, who has refused to allow it, he may set up the claim as a credit in a suit brought against him for any balance claimed to be due from him.

And in the United States vs. The Bank of the Metropolis, 15 Peters, 377, in an action brought by the United States to recover moneys deposited with the defendant, the defendant pleaded that certain drafts accepted by the Postmaster General had been bought by it in the usual course of its business, which were offered as a set-off, and the plea was sustained.

Aside from these decisions, in United States vs. Wilkins, 6 Wheaton, 135, it was held, Justice Story delivering the opinion, that the act of 1797 "intended to allow the defendant the full benefit at the trial of any credit, whether arising out of the particular transaction for which he was sued, or out of any distinct and independent transaction which would constitute a legal or equitable set-off, in whole or in part, of the debt of the United States.

Now, although the accounting officers of the United States have, according to the pleadings, admitted the demand of the defendant to be just, they have refused to allow it in settlement of the sums due upon the coupons, which defendant admits its obligation to pay. The case therefore falls clearly within the letter and spirit of the act of 1797.

2. Although the original proceeding was in chancery, the demands on both sides are legal.

It is said, in Story's Eq. Jur., vol. 2, par. 1436, " Where there are cross demands between the parties of such a nature, that if both were recoverable at law, they would be the subject of set-off; then, in such case, if either of the demands be the subject of equitable jurisdiction, the set-off will be enforced in equity. As, for example, if a legal debt be due to the plaintiff by the defendant, and the defendant is the assignee of a legal debt due a third person, which has been duly assigned to himself, a court of equity will set off one debt against the other, if both debts could properly be the subject of set-off at law.

Citing 2 Simons, 461.

3. But, independently of any statute, the right of set-off in an action brought by the Government is recognized.

In the case before cited in 6th Wheaton, Judge Story says the act of 1797 recognizes this right and only regulates its assertion. To the same effect is the decision in Allen vs. The United States, 17 Wallace, 207, where the United States successfully maintained a plea of set-off without any statute authorizing it.

And the whole doctrine and all the decisions are fully set forth by Mr. Abbott in his United States Practice, 2d vol., 155, and sequel.

J. E. BAILEY,
For Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

NASHVILLE & CHATTANOOGA R. R. CO.
vs.
THE UNITED STATES.
} No. 115.

ERROR TO UNITED STATES CIRCUIT COURT, MIDDLE DISTRICT OF TENNESSEE.

DEFENDANTS' BRIEF.

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STATEMENT.

The substance of the present case is this: Prior to the late war the State of Tennessee had built, or been chiefly instrumental in building, a system of railroads in that State, retaining a lien to secure the sums so expended. See Code of Tennessee (A. D. 1858), Title 8, ' Of Internal Improvements," chapter 1, sections 1071 *et seq.;* same title and section in compilation of 1871. Among these roads was one from Nashville to Chattanooga. During the war the equipment of this and other roads was worn out and destroyed. After the cessation of hostilities, the United States offered for sale all the railroad material which it had put upon these roads, in place of that so worn out and destroyed, and for which there was no longer any special use by the government. Impoverished by the war, these companies had not the means to purchase these articles for cash; so that, had a peremptory sale for cash been ordered, these roads would have been left without locomotives or cars. Under these circumstances the legislature of Tennessee authorized the giving of bonds by the State to the United States (on which there is now due and unpaid over a million of dollars), to secure payment for some of this property that had been placed upon roads in which the State was largely interested pecuniarily; and many of these companies themselves were also permitted to buy on credit the necessary rolling-stock and equipment to operate their roads. The Nashville and Chattanooga Railroad Company was a large purchaser of this material for this purpose.

Nearly all of these corporations, and the one above mentioned among the number, failed to meet their obligations to the United States arising out of such purchases, and suits were instituted to compel payment. That against the Nashville and Chattanooga Railroad Company was commenced in the United States circuit court for the middle district of Tennessee, and, with others of like character, was pending therein prior to and in the year 1871, and was subject to be there heard and determined up to the 10th day of November, 1871, when a final decree was made therein (Record, 5, Exhibit A), by which the company was found indebted to the United States in the sum of $1,000,000 (which was less than half the sum claimed, a discount in price having been allowed), payable one-half in ten and the other half in twenty years from the 1st day of June, 1871, with semi-annual interest at four per cent.; for which sums the coupon bonds of said company, secured by a mortgage of its franchise and property, upon which said indebtedness was also a lien, were issued. It was further decreed that, in case of default, for ninety days after they fell due, of payment of the bonds or interest coupons, "then the United States, on filing with the clerk of this court any of said coupons or bonds past due and unpaid for ninety days, shall have the right to have issued an order for the execution of this decree to the extent of such default by the sale of the railroad and other property of the defendant, as hereinbefore described, subject to the continued lien of this decree and of the bond and mortgage representing the same debt," &c. (Record, 7), "and *for this purpose* this cause is retained in court until otherwise ordered." (*Ib.*)

This decree was based upon, and strictly followed, the terms of an agreement of compromise mentioned therein, entered into between the parties under the authority of an act of Congress approved March 3, 1871, which reads as follows:

> Whereas certain suits are now pending in the United States courts, within the State of Tennessee, against certain railroad corporations in that State, on account of property sold to said corporations by the government, which suits are contested by the defendant corporations; and
>
> Whereas it is for the interest of the government to speedily adjust and collect the claims of the United States while avoiding litigation and loss by the insolvency of any such railroads: Therefore,
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of War be, and is hereby, authorized

and required, if he shall deem it advisable, by and with the advice of the counsel of record in such suits for the United States, and the Attorney-General of the United States, to compromise, adjust, and settle the same upon such terms as to amount and time of payment as may be just and equitable, and best calculated to protect the interests of the government. (16 Stats., 473.)

During the April term, 1876, of that court, the United States Attorney filed with its clerk fifty-seven coupons for $100 each, issued by said company in compliance with the terms of said agreement and decree, "which said coupons were due and unpaid for more than ninety days prior to the filing of said coupons," (Record 1), and prayed for judgment "for said $5,700, with interest, in pursuance of said decree rendered on said 10th of November, 1871." (*Ib.*)

At the defendants' request the motion was continued to the next (October, 1876) term, when a petition was filed November 13, 1876, in behalf of the Nashville, Chattanooga and Saint Louis Railway, setting out, substantially, that it had changed its name upon consolidation with the Nashville and Northwestern Railroad Company; that the plaintiff owed it, for mail and military transportation, money that should be applied to pay and cancel these coupons; but had, through its officers, wrongfully and arbitrarily assumed to apply the amount of such transportation account to the payment of a claim by the government, and by certain officers and enlisted men for clothing and articles lost while being carried over the defendants' road; and asking to have the sum earned by such carriage of mails and supplies offset against and applied in payment and cancelation of the interest coupons filed as aforesaid. (Record, 1–5.)

To this petition the United States Attorney demurred. (Record, 12.)

The demurrer was sustained and execution ordered to issue for $5,700, the amount of the coupons so filed, with interest from December 1, 1875, when they became due and payable. (Record, 13.) The defendant excepted. (*Ib.*)

BRIEF.

I.

The original bill filed by the United States was a *chancery* proceeding. (Record, 5, middle Exhibit A.)

It came to a final decree. All that remained to be done was for the issuing of executions thereon from time to time as the circumstances and the continuing character of the decree and of the agreement upon which it was based might require.

The claim set up by the petitioning company is an entirely independent one, arising subsequently to the settlement of the decree for services since rendered. Indeed, the *parties* are different. The United States sued the Nashville and Chattanooga Railroad Company and obtained by a compromise a decree for $1,000,000—less than half the amount due under the original terms of sale—secured by a mortgage and lien upon its property. Subsequently, certain parties, who either already own or purchase the road, subject to this incumbrance, also buy the Nashville and Northwestern Railroad Company (or else the Nashville and Chattanooga Railroad Company buy the other) and consolidate them under the name of the Nashville, Chattanooga and Saint Louis Railway, the petitioner.

But whether this last-named company is the identical person in law against whom the decree was obtained is immaterial. The *claim* is as absolutely independent of the one set out in the original bill as it is possible to conceive. That the officers of the War Department or the government have assumed to make an appropriation, supposed or found to be improper, of the earnings of the company, does not affect the case. Its petition could not be sustained even if the sum remained due (or was alleged to be so) without any reason assigned for withholding it. The claim is entirely disconnected with that which was the basis of the original complaint. Therefore the petition setting it up cannot be treated as a cross-bill. A cross-bill can be sustained only on matter growing out of the original bill. (Cross *v.* De Valle, 1 Wallace, 1; Rubber Co. *v.* Goodyear, 9 Wallace, 807; Daniel *v.* Morrison, 6 Dana, 186; Gouverneur *v.* Elmendorff, 4 Johns. Ch., 357; Field *v.* Schieffelin, 7 Johns. Ch., 252, *et seq.*; Gallatian *v.* Erwin, Hopk., 48, 58–9, affirmed in 8 Cowen, 361, 385; Griffith *v.* Merritt, 19 N. Y., 529, 530; Rutland *v.* Paige, 24 Verm., 181, 184; Anderson *v.* Hobson, 23 Ala., 219, 239; Josey *v.* Rogers, 13 Georgia, 478, 482; Rowan *v.* Sharp's Rifle Co., 33 Conn., 31, cited *infra.*)

In the last-named case, it was held that it was no ground for sustaining a claim upon a cross-bill, that there was no other remedy, because the complainant was really the British Government, and not liable to suit; but that, on the contrary, it would be a fraud upon the privilege of exemption from suit "to use the appearance of such party in court for another and distinct purpose as the occasion of making him respond to a claim that otherwise he could not be sued upon." (33 Conn., 32.)

II.

Nor is this such a claim of set-off as would ever have permitted it to be filed, at any time, against that of the original bill, either under the statute or independently of it.

The right of set-off in courts of equity, independently of statute, is confined to matters arising out of the same transaction. (2 Story's Eq. Jur., § 1434.)

At common law no right of set-off was recognized in actions at law. (United States *v.* Eckford, 6 Wallace, 488 to 491, and cases there cited; Merriweather *v.* Bird, 9 Geo., 595; Waterman on Set-off, p. 10, § 7.)

1. The statute (act of March 3, 1797, c. 20, § 3, embodied in R. S., sec. 951) is very strict. The present claim cannot stand upon it. Suppose this to be a "suit," within the meaning of that section, and this corporation to be an "individual," yet it is apparent that the set-off to be allowed must be a claim for a credit upon the very account sued by the government, and must be so presented as to be heard upon the trial of and be determined with that account. It must "have been presented to *the accounting officers of the Treasury* for examination, and have been by them *disallowed*,"—because, if allowed, the account would be reduced to that extent by the very allowance made. This claim has never been presented to the accounting officers of the Treasury as for a *credit* upon the demand of the government for the sum due on the coupons filed; or as a credit upon the debt represented by the bonds to which those coupons were attached. It has been audited, we will suppose (as the petition indicates), as an independent claim of the

petitioner for services rendered, and to this extent has been ascertained and liquidated; but it has never been set up at the Treasury as an offset to the bonded indebtedness of the company and been *rejected*.

This is a sufficient answer to the present petition, and fully justifies the ruling of the court below. (6 Wallace, 491, middle; United States *v.* Gilmore, 7 Wallace, 491; Halliburton *v.* United States, 13 Wallace, 63.)

But it is preferred to obtain an opinion from the court, if possible, which shall prevent a repetition of the course adopted by the petitioner as to any coupons hereafter falling due.

2. Neither is this a matter of equitable set-off outside the statute.

In Greene *v.* Darling (5 Mason, 212), Story, J., says "that courts of equity will set off distinct debts where there has been a *mutual credit* [the italics are his], upon the principles of natural justice, to avoid circuity of suits, following the doctrine of compensation of the civil law to a limited extent." To the same effect is the language of the same judge in Dade *v.* Irwin. (2 Howard, 383, 385; Howe *v.* Sheppard, 2 Sumner, 412; Gordon *v.* Lewis, *Id.*, 151.)

"There is no principle of equity which will warrant the setting off distinct and independent claims against each other." (Gaylord *v.* Couch, 5 Day, 230, p. 4.)

Waterman, in his work on Set-off, page 19, § 15, refers to the above-cited case of Greene *v.* Darling as examining the whole doctrine of set-off, and showing that "the mere existence of distinct debts is not sufficient to give the right, unless there is some mutual credit in relation to such debts, arising from the course of dealing between the parties."

In a later section, in the chapter treating of "Set-off in equity," the same author says: "§ 379. But the mere existence of mutual and independent demands does not authorize the interposition of equity to set them off against each other. To warrant the interference of equity, there must be circumstances from which it can be inferred that one debt was contracted on the faith of the other," &c., citing cases. (Waterman on Set-off, pp. 424–5, § 379.)

In his work on Equity Jurisprudence, Judge Story gives the meaning of the term "mutual credit," used by him, as appears by the foregoing quotation from his opinion in Greene *v.* Darling (5 Mason, 212). He thus defines it: "By mutual credit, in the sense in which the terms are here used, we are to understand a knowledge on both sides of an existing debt due to one party, and a credit by the other party, *founded on and trusting to such debt as a means of discharging it.*" (2 Story's Eq. Jur., § 1435, 12th ed., p. 684.)

See also the language of Kent, C., in Duncan *v.* Lyon (3 Johns. Ch., 358).

As an illustration of the connection required between the debts to justify an equitable set-off of them, we will cite the "single example" referred to by Mr. Waterman in § 382 of his work on Set-off: "Rent due cannot be set off in equity for a breach of the covenant of quiet enjoyment. As one demand is for an account of transactions under the contract, and the other for damages for the breach of it, the object and subject-matter are totally distinct; and the fact that the agreement is the origin of both does not form the necessary bond of union." (Rawson *v.* Samuel, 1 Craig & Ph., 161.)

There was no "mutual credit" here; no trusting of the government upon the strength of the bonded indebtedness of the road to it; no equitable lien upon the fund, consisting of its own debt.

The original bill, and the decree in which it culminated, were to enforce performance of an express, specific contract; the petition is to enforce payment, upon subsequent implied contract, for so much as the services rendered may be found to be reasonably worth.

3. The parties are not the same as to the original bill.

If the consolidation of the two roads did not change the identity of the Nashville and Chattanooga Railroad Company, and create a third legal entity different from the two of which it was compounded, yet it is apparent that a large (if not the larger) portion of the earnings of the Nashville, Chattanooga and Saint Louis Railway, arising from the carriage of persons and freight for the government, must accrue from the use for mail and military transportation of that part of their road between Nashville and Saint Louis, formerly known as the Nashville and Northwestern Railroad Company.

Non constat but that the United States have a claim upon the Nashville and Northwestern Railroad Company similar to that upon the old Nashville and Chattanooga Railroad Company, to which they have a right to apply the whole or a part of the governmental indebtedness springing from the use of that portion of the petitioner's road; like the right secured in the acts relative to the Pacific Railroads.

If it be answered that there is no propriety in conjecturing such a thing, we rejoin that the petition, if intended as a cross-bill, is defective in not setting out the original bill and all those facts necessary to show an undeniable equity to have the set-off made as asked.

Especially is this so when the petitioning corporation bears a different name and transacts its business between very different termini than those appertaining to the respondent to the original bill.

The fair conclusion is that a new party is introduced, which is fatal to a cross-bill. (Shields *v.* Barrow, 17 Howard, 145.)

4. As just above suggested, a cross-bill must contain a full statement of the original bill and the proceedings thereon; in order that, by examining the prayer and objects of the original bill, it may be perceived whether or not new and distinct matters are introduced. (Story's Eq. Pleadings, § 401.) If it contain such new matter, it is demurrable. (*Id.*, § 628, (4), cases above cited and *passim.*)

5. Introducing new matter, as this petition does, it does not "avoid circuity of suits," which is the reason assigned by Judge Story for permitting cross-bills to be filed to obtain a set-off. (Greene *v.* Darling, 5 Mason, 212.) The subject-matter of the petition being denied, a trial of the facts and determination of the law pertaining to questions not at all agitated in the original bill would become necessary.

6. The nature of the demand itself is not such as to confer equity jurisdiction. It claims, we suppose, to rest upon that acquired by the original bill; but that was exhausted by the decree.

7. The petition is defective in its phraseology and statements. It should declare not only the exact amount ($ 5,700) due the United States (which, though not there mentioned, we learn from other parts of the record), but

the precise sum claimed by the road, which it is proposed to have set off against that amount. Otherwise, it cannot be known whether or not there is any balance remaining due to the government for which execution ought to issue. Instead of such precision, we have the allegation that "the sums so retained amount to between $ —— and $——." (Record, 4, folio 7.) While it may well be that an orator may ordinarily fill blanks for dates and amounts, it would seem that in a claim for set-off the sum should be definitely declared; whereas here it is apparent that it was never intended to be precise; but it was proposed to demand some unknown sum "between" the amounts to be put into the blanks following the dollar marks. The sum audited is also left blank, "$——."

8. The uncertainty of the sum demanded, notwithstanding an averment that the amount earned had finally been passed upon by the Second Auditor, must arise from an incertitude as to the extent of the deduction which the government might fairly make.

The claim for baggage and property lost does not appear to us to be so utterly monstrous and absurd as it does to the petitioner. It has recommended itself to the able lawyer then at head of the War Department, to whom the letter (Exhibit C; Record, 9) was addressed, and to him who has just relinquished that portfolio. Claims against common carriers for negligent loss of baggage are based upon the contract for safe carriage. Now, in this instance, the contract for such conveyance was with the United States, by whom the passages were payable. A breach of that contract could be sued upon by the United States, the contracting party, to its own use so far as its property was lost, and to the use of the men and soldiers so far as they were interested, they being carried not at all for their own convenience or necessity, but solely because it suited the purposes of the United States that they should be thus transported from one point to another to perform military duty.

These suggestions are thrown out to indicate the nature and scope of the inquiry to which the petitioners invited the attention of the court.

9. A word may be said, too, about the nature of the claim against which the set-off is sought to be made. It was for coupons, issued for interest upon bonds, negotiable and passing by delivery. The United States have the right to sell them and pass to its assignee a right to have the decree and lien enforced for his benefit to the necessary extent.

The claims sought to be set-off are not of the same kind or quality. (McDonald *v.* Neilson, 2 Cowen, 174, top.)

III.

We have treated and discussed this petition as a cross-bill for a set-off, because it is not thought that there is any other issue that would be entertained even long enough for discussion. As an original bill, setting out an independent ground for redress, it is fatally defective both in form and substance. Yet such it is, in fact (Roberts *v.* Peavey, 29 N. H., 394); and our effort has been to show that this character could not be changed by calling it a cross-bill for a set-off.

1. As an original bill, it cannot be filed at all. As a cross-bill for a set-off, *it is filed too late.*

Of a similar petition, Story, J., said: "It is very clear that the claim cannot be asserted in the present suit; and if it could have been, at any stage of the suit, asserted (which is denied), *the proceedings have passed that stage.* * * * Upon this petition, it is impossible for the court, in this suit, to go into any proofs of the material facts asserted in it, and which are vital to the relief sought. * * * The proper course would have been to have filed a cross-bill *at an earlier stage* of the proceedings, or now to institute an original bill in some court competent to maintain it. But if a cross-bill had been duly filed, or an original bill were now before this court, asserting the same facts, and they were all proved, my judgment is that it is not a case in which a court of equity could grant the relief. The jurisdiction of courts of equity in matters of set-off is *very narrow*, and *closely follows that of the law.* The mere fact of the existence of mutual demands constitutes no ground in equity for a set-off, however reasonable it might have been to have allowed it upon principles of natural justice. The authorities are the other way" (citing them and continuing to the same effect as hereinbefore quoted): Gordon *v.* Lewis, 2 Sumner, 633; see same case, *id.*, 151, bottom; Dade *v.* Irwin, 2 Howard, 390, 391. "A cross-bill should not introduce new and distinct matters not embraced in the original suit; for, as to such matters, it is an original bill, and *they cannot properly be examined at the hearing of the first suit,*" which is the time for hearing a cross-bill. (Story's Eq. Pleadings, § 401, last sentence.)

"§ 381. A debt cannot be set off in equity any more than at law, unless it existed against the plaintiff, in favor of the defendant, *at the time of the commencement of the suit*, and had *then* become due and payable." (Waterman on Set-off, § 381.)

In an action at law this court denied the defendant's right to a continuance that he might present his claims for credit at the Treasury, under the act of March 3, 1797. (United States *v.* Hawkins, 10 Peters, 125, 132.) A cross-bill must always be seasonably filed so as not to delay proceedings upon the original bill, and go on to a hearing *pari passu* with it. (Cartwright *v.* Clark, 4 Metcalf, 110, 111; Irving *v.* DeKay, 10 Paige, 319, 322.)

2. If filed after the replication it can only be by special leave of court, and none such appears in the record of this case. (Cartwright *v.* Clark, 4 Metcalf, 110; Roberts *v.* Peavey, 9 Foster (29 N. H.), 392 to 394; Jackson *v* Grant, 3 C. E. Green, 145, 150–1.)

IV.

"As an original bill the court might properly refuse to consider it. First, on account of the parties; and secondly, on account of the subject-matter. * * * The second objection is equally conclusive, whether it be called a cross-bill or an original." (Cross *v.* De Valle, 1 Wallace, 14.)

1. As to the governmental privilege of exemption from suit, though we have not found it necessary to dwell upon it, it seems to bar this petition as an original bill. We object to the use of this privilege as the basis of equitable interference, subjecting the government to suit, for the very reason that it cannot be sued. This was the course of the argument in the case of Rowan *v.* Sharp's Rifle Company (33 Conn., 1), but the court of that State declined to recognize it.

2. As a cross-bill, it must be dismissed upon two grounds: that it sets up a *legal* right, and relates to matters not agitated in the original bill. (Daniel *v.* Morrison, 6 Dana, 186–7.) For both these reasons this court said of a similar petition: "The bill steers aside of the assertion of any equity upon the foundation of which it can rest for support." (Dade *v.* Irwin, 2 Howard, 391.)

3. As a petition, not amounting to a cross-bill and not relating in any wise to the subject-matter of the original litigation, it can have no legal recognition.

4. The petitioners suffer from no such hardship and outrage as they allege.

If they have a legal claim for services not yet compensated, the Court of Claims is open to them for the assertion of their rights. If the United States set up an untenable counter-claim there, it will be easy to show its futility.

The remedy at law is ample and appropriate. There is no occasion for resort to equity for relief.

The plaintiff's brief has not been filed, and we may have occasion to ask leave to file a reply thereto hereafter.

CHARLES DEVENS,
Attorney-General.
EDWIN B. SMITH,
Assistant Attorney-General.

OFFICE SUPREME COURT U.S.
FILED
APR 27 1880
D. W. MIDDLETON, Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

NASHVILLE AND CHATTANOOGA RAILROAD COMPANY
vs.
THE UNITED STATES.
No. 115.

APPELLEE'S REPLY.

I.

So far from admitting that the government's claim was one in law rather than equity, we made it a distinct objection that the original bill was not recited, and that we knew nothing of the character of the proceedings except that they were in chancery. True, the suit was *compromised* by an agreed decree for $1,000,000; but it was to settle a cause in equity.

The act of March 3, 1871, printed in our opening brief, *only* authorizes the compromise of such suits "as to amount and time of payment." (16 Stats., 473.) It did not empower the Secretary of War and Attorney-General to settle *all* disagreements between the parties, but only those arising "on account of property sold to said corporations by the government." (*Ib.*) The terms of the consent decree were arranged by the district attorney, and it only purports to be—as, under the act it refers to, it could only be—"a compromise of all *the* matters *in litigation* between the parties." (Record, 5, bottom; folio 10.) It was evidently not the intention to embrace any claim the United States might have against the road *as common carriers;* but only for rolling-stock, fixtures, &c., sold, and the counter-claim for similar property captured or seized by the United States and used up during the war. This claim for baggage was not "in litigation."

At all events it resulted in the unquestionable right of the government, "if at any time hereafter the said Nashville and Chattanooga Railroad Company make default for the period of ninety days in the payment of any of the installments of interest," to have execution issued therefor. (Record, 7, top.)

The right to an order for execution depended *solely* upon the question whether or not the company had made default of *payment* for ninety days; not whether or not it had an off-set by reason of services rendered.

That issue, as before suggested, is proper to be raised and determined in the Court of Claims, unless the United States chooses to sue the road in some other tribunal. It raises questions of *fact*, as well as of law, upon which the verdict of a jury or of the Court of Claims, sitting to find facts as a jury does, is proper.

Enough has been said in our former brief about the peculiar character of accounts in set-off and the stage of the suit at which they must be presented at law or in equity. The language quoted by Senator Bailey, from Story's Equity Jurisprudence, must be taken in connection with other passages referring to the nature of the claims to be set-off, and the time for making it. The case of Allen *v.* United States (17 Wall., 207) arose in the Court of Claims and depended upon the peculiar statutory jurisdiction of that tribunal.

II.

This corporation giving the bond confessedly had made default of *payment* of its coupons for more than ninety days when execution was called for. The present company could not excuse this by saying it had rendered mail service to the United States under an express or implied contract. That would not amount to a *payment* upon this indebtedness unless so intended and accepted by both parties, and it was rendered and presented too late for a set-off if ever it could have been entitled to that character.

"Payment, in a legal sense, is the discharge of a contract or obligation, in money or its equivalent, and it is usually made with the assent of both parties to the contract." (Brady *v.* Wasson, 6 Heisk., 135, top.)

"The term 'payment,' in its legal import, means the full satisfaction of a debt of money, not by an exchange or compromise, or by an accord and satisfaction; and it is only where the words used in connection with it plainly manifest a different intention that the legal import of the term can be rejected" (Manice *v.* Hudson River R. R. Co., 3 Duer, 441). As to the assent required to convert the subject of set-off into a payment, see Dodge *v.* Swazey, 35 Maine, 535; Prather *v.* State Bank, 3 Ind., 356.

"To constitute a payment, money or some other valuable thing must be delivered by the debtor to the creditor for the purpose of extinguishing the debt; and the creditor must receive it for the same purpose. In this case the debtors forwarded to the plaintiffs money